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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 1408.

EMILE BOESCH AND MARTIN BAUER, APPELLANTS,

vs.

ALBERT GRAFF AND J. F. DONNELL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

FILED OCTOBER 18, 1889.

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1 *Bill of Complaint.*

In the Circuit Court of the United States in and for the Ninth Judicial Circuit, Northern District of California.

ALBERT GRAFF and J. F. DONNELL, Complainants,
vs.
EMILE BOESCH, Defendant. } In Equity.

To the honorable the judges of the circuit court of the United States for the ninth circuit within and for the district of California:

Albert Graff, a resident of the city and county of San Francisco, in the State of California, and a citizen of said State and of the United States, and J. F. Donnell, a resident of the city and county of New York, in the State of New York, and a citizen of said State and of the United States, bring this their bill against Emile Boesch, a resident and citizen of the city and county of San Francisco, State of California.

And thereupon your orators complain and say that heretofore and before the 14th day of November, 1879, one Carl Schwintzer and Wilhelm Graff, subjects of the King of Prussia, German Emperor, both residing at the city of Berlin, Prussia, Germany, were the true, original, and first inventors or discoverers of a certain new and useful invention, to wit, an improvement in lamp burners, of that class in which a series of wick tubes — arranged equidistantly from the axis of the burner and moved up and down in a series of guide tubes, the burners of said class being known by the name of "Mitrailleuse" burners; and the invention consists of a ring-shaped cap arranged at the upper part of fixed guide tubes, said cap being provided with openings for the wicks. The pinion by which the wicks and wick tubes are adjusted is placed entirely within an annular casing of the burner, and is rendered accessible by a detachable ring at the lower part of said casing. The actual pinion engages a rack bar that is attached by an inwardly extending arm to the center of the bottom plate of the wick tubes, said rack being located between two adjoining wick tubes. The bottom plate of the wick tubes is provided with a hinged stop device, so as to prevent the wick tubes from projecting above the guide tubes, and thereby avoid the burning of hooks arranged at the upper end of the wick tubes. And that letters patent have heretofore been granted to them by the Government of Germany, No. 10621, dated November 14th, 1879; No. 10846, dated January 13th, 1880, and No. 11713, dated March 26th, 1880, and that the said invention was not known or used by others before their invention or dis-
2 covery thereof, and was not at the time of the application for letters patent therefor in public use or sale with the consent or allowance of said Carl Schwintzer and Wilhelm Graff, as the inventors or discoverers thereof, contrary to the provisions of the statutes of the United States in such case made and provided; that, being

such inventors so as aforesaid, the said Carl Schwintzer and Wilhelm Graff made application in writing to the Commissioner of Patents of the United States for the granting of letters patent for said invention in accordance with the then existing laws of Congress and duly complied in all respects with the conditions and requirements of said laws.

That on the 4th day of December, A. D. 1883, letters patent of the United States, bearing date on that day, were issued to the said Carl Schwintzer and Wilhelm Graff in due form of law, under the seal of the Patent Office of the United States, signed by the Secretary of the Interior and countersigned by the Commissioner of Patents of the United States, and numbered 289,571, whereby there was granted to them, their heirs, executors, administrators, and assigns, for the term of fourteen years from the fourth day of December, 1883, the full and exclusive right and liberty of making, constructing, using, and vending to others to be used the invention or discovery aforesaid, a description whereof was given in the words of the said Carl Schwintzer and Wilhelm Graff in the schedule annexed to the said patent and was made part of the same.

That by regular assignments made in writing and recorded in the United States Patent Office an equal one-half interest in all the rights and privileges by said patent conferred was granted, assigned, and conveyed by said Carl Schwintzer and Wilhelm Graff to J. F. Donnell, one of the complainants herein, the said assignment being made to J. F. Donnell in the firm name used by him in his business—viz., J. F. Donnell & Co.—prior to the 4th day of December, 1883.

That by regular assignments made in writing and recorded in the United States Patent Office the remaining one-half interest of said Carl Schwintzer and Wilhelm Graff in said letters patent issued to said Carl Schwintzer and Wilhelm Graff and J. F. Donnell as aforesaid and in and to all the rights and privileges by said patent conferred was granted, assigned, and conveyed by said Carl Schwintzer and Wilhelm Graff to Albert Graff, one of the
3 plaintiffs herein, prior to the 23rd day of April, 1885, since which date last named the plaintiffs herein have been and still are the exclusive owners of said letters patent and of all the rights, liberties, and privileges by said letters patent granted and conferred.

That from the time of the granting to Carl Schwintzer and Wilhelm Graff of said letters patent until the assignment of the interest in said patent to J. F. Donnell and Albert Graff, the complainants herein as aforesaid, the said Carl Schwintzer and Wilhelm Graff put said invention into use by making, using, and vending the same to others, and since the date of said assignments to J. F. Donnell and Albert Graff as aforesaid your orators have been hitherto constantly engaged in manufacturing and using and selling to others to be used the said invention and improvement in lamp burners, to their great advantage; and your orators further show that said letters patent granted as aforesaid by the Government of Germany have been in controversy before the superior court of justice at Berlin,

department two, criminal, in an action and suit founded thereon wherein The King of Prussia was plaintiff and Julius Eckel defendant; that said action came on for trial before said court at a session of February 5th, in the year 1885. Said defendant was represented by counsel and vigorously contested said action, denying the infringement of said letters patent and denying the novelty of the invention therein described, and attempted to prove that the same had been previously known to and used by said Julius Eckel at Berlin.

That said suit was argued by counsel at said term, and thereupon, upon consideration thereof, decision was rendered in said suit decreeing that said letters patent were valid and that the defendants had infringed the same, and sentencing him to pay the costs of court and a fine of 200 marks, and in the event of failure to pay said fine that he be imprisoned one day for each ten marks of said penalty, and empowering said Carl Schwintzer and Wilhelm Graff to take possession of the burners under seizure.

And your orators have ever since the date of the assignment of said letters patent been and now are entitled to all the rights, interest, and privileges thereby secured unto them in and to the said invention or discovery in the said letters patent and assignments, and are and ever since said date have been entitled to the exclusive use of said invention and improvement.

4 And your orators further show unto your honor that, so being the owner of said letters patent and invention and of all the rights and privileges granted and secured thereby, they have expended and invested large sums of money, have been put to great expense and trouble in and about said invention and for the purpose of having the business of making and selling said invention profitable to themselves and useful to the public; that said invention has been of very great utility and useful to the public, that the same has been extensively introduced into public use, and that the public have generally acquiesced in your orators' exclusive right to the same, and your orators would, but for the wrongful acts of said defendants and others acting in concert with him, have made large gains, profits, and advantages from the manufacture, sale, and use of said invention so patented as aforesaid, and your orators would, but for the wrongful acts and doings of the said defendant and others acting in concert with him, now be enabled to use the said invention to which they are entitled to the exclusive right as aforesaid and with profit and advantage, but that by the said wrongful acts and doings they are now prevented and hindered from so doing.

And your orators further show unto your honor, on information and belief, that the said defendant, well knowing the premises and rights and privileges secured unto your orators as aforesaid, but contriving to injure your orators, and in order to deprive them of all profits and benefits and advantages which might and otherwise would accrue to them from said invention after said assignments of said letters patent as aforesaid and before the commencement of this action, without the license or allowance of your orators or either of them and against the will of your orators or either of them and

without right to make, use, and sell and procure to be made, used, and sold, has ever since the first day of May, 1885, within the city of San Francisco and elsewhere within the State of California, and at various other places in the United States, unlawfully and wrongfully made and used and sold or caused to be made, used, or sold lamp burners each and all containing
5 said invention, discovery, improvement, and combinations described and claimed in said letters patent—

1st. By the employment or use of the combination with the guide tubes of a ring-shaped cap provided with openings for the wicks, such cap being applied to the upper ends of the guide tubes so as to close the intermediate spaces between the same, for the purpose described.

2nd. By the employment of the combination of fixed guide tubes, a series of wick tubes moving therein, a rack for actuating the same arranged at one side thereof, a pinion for engaging the rack, and an annular inclosing casing made of a fixed portion, and a detachable ring section, for the purpose described.

3rd. By the employment of a system of wick tubes connected by a bottom plate, a series of guide tubes, means for raising or lowering the wick tubes, as for the purposes described, the exclusive right to which is secured to your orators as above set forth, and which said unlawful use and sale by the defendant as aforesaid is a violation and infringement of your orators' rights and privileges, and the said defendant still continues to use and keep in use such lamp burners within the aforesaid city and at other places and threatens to continue to use and make and sell the same and cause the same to be made, used, and sold, all in defiance of the rights acquired and secured to your orators as aforesaid, to their great and irreparable loss and injury, by which he has been and still is being deprived of great gains and profits which he might and otherwise would have obtained, but which have been received and enjoyed and are being received and enjoyed by the said defendant, and through his aforesaid unlawful acts or doings, whereby your orators have been greatly damaged and suffered great loss, and from which said use said defendant has derived and received and is still deriving and receiving great gains and profits, but to what amount your orators are ignorant and cannot set forth, but your orators believe the same to be about the full sum of two thousand dollars, and so charge the fact to be and pray that the defendant may be required to make a full disclosure of all such gains and profits, which said gains and profits your orators are, by virtue of the act of Congress in such case made and provided, entitled to have and recover from the said defendant.

6 And your orators in like manner aver that the defendant, though requested to desist from such unlawful use and to pay your orators such gains and profits as the defendant has actually made, refuses so to do, by means whereof your orators are and have been greatly injured and are now prevented from putting the said invention or discovery into successful operation and are deprived and prevented from receiving the gains and profits to which

they are lawfully entitled from the exclusive rights and privileges so granted and secured to them as aforesaid and which they would have derived and acquired and would now derive and acquire but for said wrongful acts of the said defendant.

And your orators further say that the use of said invention by said defendant and his preparation for and avowed determination to continue the same and his other aforesaid unlawful acts in disregard and defiance of the rights of your orators have the effect to encourage and induce others to venture to infringe said letters patent in disregard to your orators' rights; and forasmuch as your orators can have no adequate relief except in this court, to the end, therefore, that the said defendant may, if he can, show why your orators should not have the relief hereby prayed for—

Your orators pray that the defendant may upon his oath, according to his utmost knowledge, information, and belief, all true, direct, and perfect answers make to the premises and to all the several matters hereinbefore stated and charged as fully and particularly as if severally and separately interrogated as to each and every of said matters, and especially that said defendant answer and set forth—

First. Whether the said Carl Schwintzer and Wilhelm Graff were not, prior to the 14th day of November, 1879, the true, first, and original inventors or discoverers of the said invention or discovery described in said letters patent and every material part thereof, and, if not, who was or were the true, original, or first inventor or inventors of the same; and if any other person or persons was or were the true, first, and original inventors of the same, where he or they reside and where and when he or they invented or discovered the same, and how the invention or discovery of such other person or persons, if any, differed, if at all, from the said invention or discovery of said Carl Schwintzer and Wilhelm Graff.

7 Second. Whether the said defendant has at any time and, if so, where and when made, sold, used or caused to be made, sold, or used any lamp burner or burners having, employing, or using a series of wick tubes arranged equidistantly from the axis of the burner and moved up and down in a series of guide tubes, as and for the purpose described in said letters patent; or, if the lamp burners differed from those described in said letters patent, in what particulars they differed therefrom or in what respect they were differently applied or combined from those described in said letters patent, if at all.

Third. Whether the lamp burner or burners now in use by the defendant was and is not substantially similar to the lamp burner described in said letters patent; and, if not, how the same differs therefrom.

Fourth. Whether the defendant has not made large gains and profits from the use of such lamp burners; and, if so, to what amount.

And your orators pray that the said defendant may be compelled by a decree of this honorable court to account for and pay over to your orators the gains and profits by him acquired and the damages suffered by your orators from the aforesaid unlawful acts.

And your orators pray that the said defendant, Emile Boesch, and his servants, agents, attornies, and workmen and each and every of them may be restrained and enjoined by the order and injunction of this honorable court from directly or indirectly making, constructing, using, vending, delivering, or putting in use any lamp burner made in accordance therewith or like or similar to those which he has heretofore made, and from making or using or vending any lamp burners similar or substantially similar to those described and claimed in said letters patent, as he has heretofore made or used or sold, and that said defendant may be decreed to pay the costs of this suit, and that your orators may have such other and further relief as to this honorable court shall seem meet, just, and shall be agreeable to equity.

May it please your honor to grant unto your orators the writ of injunction issuing out of and under the seal of this honorable court commanding, enjoining, and restraining the said Emile Boesch, his agents, servants, attornies, and workmen, and each and every
8 of them, as is hereinbefore in that behalf prayed; and also to grant unto your orator the writ of provisional or preliminary injunction restraining the defendant, Emile Boesch, his servants, agents, attornies, and workmen and each and every of them, from the use and sale of said invention during the pendency of this action. May it please your honor to grant unto your orators the writ of subpœna issuing out of and under the seal of this honorable court, directed to the said defendant, Emile Boesch, commanding him by a certain penalty to be and appear in this honorable court, then and there to answer the premises and to stand and abide by such order and decree as may be made against him.

And your orators will ever pray.

WM. H. SHARP,
Solicitor for Complainants.

D. W. DOUTHITT, *Of Counsel.*

9 *Verification to Bill of Complaint.*

UNITED STATES OF AMERICA, }
District of California, } *ss:*

Albert Graff, being first duly sworn, deposes and says that he is one of the complainants in the foregoing bill of complaint named; that he has read the within and foregoing bill of complaint and knows the contents thereof; that the same is true of his own knowledge except as to the matters which are therein stated on his information or belief, and as to those matters that he believes it to be true.

ALBERT GRAFF.

Subscribed and sworn to before me this 17 day of September, 1886.

[SEAL.] JAMES L. KING,
Notary Public.

Endorsed: Filed September 17, 1886. L. S. B. Sawyer, clerk.

10 *Subpœna.*

UNITED STATES OF AMERICA:

Circuit Court of the United States, Ninth Circuit, Northern District of California. In Equity.

The President of the United States of America to Emile Boesch, Greeting:

You are hereby commanded that you be and appear in said circuit court of the United States aforesaid, at the court-room in San Francisco, on the first day of November, A. D. 1886, to answer a bill of complaint exhibited against you in said court by Albert Graff, a citizen of the State of California, and J. F. Donnell, who is a citizen of the State of New York, and to do and receive what the said court shall have considered in that behalf; and this you are not to omit under the penalty of five thousand dollars.

Witness the Honorable Morrison R. Waite, Chief Justice [SEAL.] of the Supreme Court of the United States, this 17th day of September, in the year of our Lord one thousand eight hundred and eighty-six, and of our Independence the 111th.

L. S. B. SAWYER, *Clerk.*

Memorandum pursuant to Rule 12, Supreme Court U. S.

You are hereby required to enter your appearance in the above suit, on or before the first Monday of November next, at the clerk's office of said court, pursuant to said bill; otherwise the said bill will be taken *pro confesso.*

L. S. B. SAWYER, *Clerk.*

I have been unable, after diligent search, to find the within-named defendant in my district.

San Francisco, Oct. 19, 1886.

J. C. FRANKS,
U. S. Marshal,
By W. L. McEWEN, *Deputy.*

Endorsed: Filed October 19th, 1886. L. S. B. Sawyer, clerk, by F. D. Monckton, deputy clerk.

11 *Amended Bill of Complaint.*

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

To the honorable the justices of the circuit court aforesaid, sitting in equity:

Albert Graff, a citizen of the State of California, and J. F. Donnell, a citizen of the State of New York, by leave of court first had and obtained, make and file this their amended bill of complaint against Emile Boesch and Martin Bauer, residents of the city and county of San Francisco, State of California, and thereupon your orators complain and say—

That heretofore, to wit, on or prior to the 28th day of July, A. D. 1883, Carl Schwintzer and William Graff, subjects of the King of Prussia, German Emperor, residing at the city of Berlin, Prussia, Germany, were the joint, original, and first inventors of a certain new and useful invention, to wit, a lamp burner.

That said invention had reference to an improved lamp burner of that class in which a series of wick tubes are arranged equidistantly from the axis of the burner and moved up and down in a series of guide tubes, the burners of said class being known by the name of "Mitrailleuse" burners, and the invention consisted of a ring-shaped cap arranged at the upper part of fixed guide tubes, said cap being provided with openings for the wicks; which said invention is more particularly described in the United States letters patent hereinafter referred to.

That the same was a new and useful invention and was not known or used in this country prior to the application for a patent therefor hereinafter mentioned, and had not been in public use or on sale for two years nor abandoned nor proved to have been abandoned.

That the said Carl Schwintzer and William Graff, being so as aforesaid the inventors thereof, did, prior to the 28th day of July, 1883, for value received, sell, assign, transfer, and deliver unto your orator J. F. Donnell, (doing business under the firm name of J. F. Donnell & Co.) the undivided one-half of all their right, title, and interest in and to said invention; that said sale and assignment was made and evidenced by an instrument in writing
12 duly executed by the said Carl Schwintzer and William Graff under their hands and seals; which said instrument in writing was, prior to the said 28th day of July, 1883, duly filed for record and recorded in the Patent Office of the United States, at Washington, with a request that any patent that might be granted for said invention by the Government of the United States should be granted and issued to Carl Schwintzer, William Graff, and J. F. Donnell & Co.

That thereafter, to wit, on the 28th day of July, A. D. 1883, said Carl Schwintzer and William Graff and J. F. Donnell made application to the Government of the United States for the granting and issuance to them of letters patent of the United States for said invention.

That prior to the said last-named date letters patent for said invention had been granted to the said Carl Schwintzer and William Graff by the Government of Germany, being numbered and dated as follows, to wit: No. 10621, dated November 14, 1879; No. 10846, dated January 13, 1880, and No. 11713, dated March 26, 1880.

That such proceedings were duly and regularly had and taken by the Patent Office of the United States in the matter of the said application; that thereafter, to wit, on December 4, 1883, after due application, letters patent were granted and issued by the Government of the United States to the said Carl Schwintzer, William Graff, and J. F. Donnell & Co. for the said invention, granting unto them, their heirs and assigns, for the term of seventeen years from

the 4th day of December, 1883, the exclusive right to make, use, and vend the said invention throughout the United States and Territories, subject to the limitation prescribed by section 4887 of the Revised Statutes of the United States by reason of said German patents dated November 14, 1879, No. 10621, and January 13, 1880, No. 10846, and March 26, 1880, No. 11713, hereinbefore mentioned.

That the shortest term for which any one of said three German patents was granted was the term of 15 years from the 14th day of November, 1879.

That said letters patent of the United States were issued in due form of law under the seal of the Patent Office of the United States and were signed by the Secretary of the Interior and countersigned by the Commissioner of Patents; which said letters patent were and are numbered No. 289,571 and bear date the 4th day of De-
13 cember, A. D. 1883, and are ready in court to be produced by your orators, or a duly authenticated copy thereof.

That prior to the issuance of said letters patent all proceedings were had and taken which were required by law to be had and taken prior to the issuance of letters patent for new and useful inventions.

That thereafter and before the filing of this bill of complaint, by a regular chain of assignment made in writing by the said Carl Schwintzer and William Graff and recorded in the Patent Office of the United States, at Washington, all the right, title, and interest of the said Carl Schwintzer and William Graff in and to said United States letters patent No. 289,571, the same being the undivided one-half of the entire interest and property in said United States letters patent, and the rights and privileges by them granted became vested in your orator, Albert Graff, as by said assignments or a duly authenticated copy thereof, which are ready here in court to be produced, will fully appear; that by virtue of said assignments your orators became, ever since have been, and now are the sole and exclusive owners and holders of said United States letters patent No. 289,571 and of all the rights, liabilities, and privileges by them granted and conferred.

And your orators further show unto your honor that since they became the owners thereof as aforesaid they have invested and expended large sums of money and have been to great trouble and expense in and about said invention and for the purpose of introducing the same and carrying on the business of making and selling said lamp burners and of making the same profitable to themselves and useful to the public; that said invention has been and is of great benefit and advantage and valuable to your orators, and large quantities of lamp burners have been made according to said invention and sold by your orators, to the great advantage of the public, and that the public have generally acknowledged and acquiesced in the validity of said letters patent, and your orators believe that they will realize and receive further and large gains and profits therefrom if the infringements by the respondents hereinafter set up shall be prevented.

And your orators further show that they have not granted licenses to any person whatever to manufacture or sell lamp burners made according to said invention, but have adopted as their chosen mode of enjoying said invention and the right and liberties con-
14 ferred by said letters patent and reserved to themselves the exclusive monopoly of making and supplying the market and selling to others lamp burners made according to said invention, and your orators are fully able to supply the demand therefor.

And your orators further show unto your honors that after the granting of the several German letters patent hereinbefore mentioned one Julius Eckel, of Berlin, Germany, infringed upon the same, and thereupon Carl Schwintzer and William Graff, the owners of said German letters patent, caused the said Julius Eckel to be prosecuted in the 2nd department (criminal) of the royal superior court of justice at Berlin, having jurisdiction in the premises, for and on account of his said infringement; that the said Eckel appeared in said action and made appropriate answer and defense therein, whereby he attacked the validity of said letters patent and denied the novelty of the invention therein contained and denied that the said Schwintzer and Graff were the inventors thereof; that the issues so joined came on regularly to be tried before said court, and witnesses were examined and evidence heard and considered; and thereafter, to wit, on the 5th day of February, 1885, a judgment and decision was duly and regularly made and entered in said action by said court, wherein and whereby it was adjudged and decreed that the said German letters patent were good and valid; that the said Schwintzer and Graff were the inventors of the invention therein contained; that the said Julius Eckel had infringed upon the same, and that he be sentenced to pay the costs of court and a fine of 200 marks; that said judgment has never been altered, modified, or reversed, and is in full force and effect.

That the court rendering said judgment was a court of general jurisdiction having a clerk and a seal and had jurisdiction under the imperial patent laws of Germany to hear and determine all controversies arising under said laws to the same extent as the circuit courts of the United States have jurisdiction to hear and determine controversies arising under the patent laws of the United States; that the said prosecution was had and conducted under said imperial patent laws and in accordance therewith, and the said judgment as to the validity of said German letters patent is of the same force and effect under said imperial patent laws as a judgment in an action at law or a decree in a suit in equity for the infringement of
15 United States letters patent in a circuit court of the United States is or could be under the patent laws of the United States.

And your orators further show unto your honors that the invention claimed, described, and protected in and by said German letters patent and passed upon and adjudicated in and by the prosecution aforesaid against Julius Eckel is identically the same invention claimed, described, and protected in and by the aforesaid United States letters patent No. 289,571.

And your orators further show unto your honors that heretofore, to wit, on the — day of ——, 1885, your orators herein and Carl Schwintzer and William Graff, being then the owners of said United States letters patent No. 289,571, commenced an action at law in this honorable court against Amiel Wangenheim and Samuel Sternheim as defendants to recover damages of and from them for an alleged infringement of said United States letters patent; that the defendants in that action having been duly and regularly served with process and having failed to appear and answer the complaint therein in the time allowed by law and having knowingly and designedly admitted and acknowledged the validity of said United States patent and being unable to make any *bona fide* attack upon its validity, their default was duly entered, and thereafter, to wit, on March 11, 1885, a judgment in said action was duly made, given, and entered in favor of the plaintiffs therein and against the defendants therein for the costs of the suit and such damages as the plaintiffs had sustained by reason of the infringements aforesaid by said defendants; that said judgment has never been changed, altered, modified, or reversed, and is still in full force and effect.

And your orators allege, on information and belief, that the public generally have acquiesced in the adjudications aforesaid and have acknowledged and acquiesced in the validity of said United States letters patent and the rights, privileges, and liberties of your orators thereunder and under the assignments thereof as aforesaid, and but for the infringements of the respondents herein your orators would be in the enjoyment of the exclusive monopoly granted and conferred by said United States letters patent; and your orators further show unto your honors that notwithstanding the premises, but well knowing the same, and contriving to injure your orators and to deprive them of the benefits and profits which might and
16 otherwise would accrue to them from said invention and the practice thereof, the respondents herein, since the issuance of said United States letters patent and since the various assignments thereof as aforesaid and since the entire rights and property in said United States letters patent became vested in your orators and before the filing of this bill of complaint at the city and county of San Francisco, and, as your orators are informed and believe, at divers other places in the northern district of California, without the license of your orators or either of them and in violation of your orators' rights and privileges, have made, used, and sold to others lamp burners containing the inventions described and claimed in said United States letters patent and constructed according to the specification thereof; that the lamp burners so made, used, and sold by respondents are infringements of the aforesaid United States letters patent, and the exact number thereof so made, used, and sold is unknown to your orators, but they allege, on information and belief, that said respondents have made and realized large gains and profits from their said use of said invention and their infringements of said United States letters patent, which would otherwise have been realized and enjoyed by your orators, and your orators have not only been thereby deprived of said gains and profits, but

have likewise been damaged by reason of the said infringements to a large extent; and your orators further show that they have requested the respondents to desist and refrain from their aforesaid unlawful use and practice of said invention and their infringements of said United States letters patent, but said respondents have failed, refused, and neglected and still do fail, refuse, and neglect to comply with said request or any part thereof.

That said respondents are still engaged in their unlawful use and practice of said invention and in infringing said United States letters patent, and threaten so to continue, and unless restrained and enjoined therefrom they will continue so to act, to the great and continual damage of your orators, who will thereby be deprived of large gains and profits which would otherwise accrue to them, and will suffer great and irreparable loss and injury.

Wherefore your orators humbly pray that the said respondents, Emile Boesch and Martin Bauer, their and each of their servants, agents, attorneys, and workmen, and each and every of them,
17 may be restrained and enjoined, both provisionally and perpetually, by the order and injunction of this honorable court, from directly and indirectly making, using, or vending any lamp burners made or constructed according to the specifications of said United States letters patent or containing the invention therein described and claimed and from infringing upon said United States letters patent, and that said respondents may be decreed to account for and pay to your orators the profits unlawfully obtained by them, the respondents, by reason of the aforesaid infringements, and also the damages thereby suffered by your orators and the costs of this suit, and that your orators may have such other and further and additional relief as to this honorable court may seem meet and such as may be agreeable to equity and good conscience.

And forasmuch as your orators have no plain, speedy, or adequate remedy at law for the wrongs and grievances herein complained of and are without any remedy therefor, save in a court of equity, where such matters are alone cognizable, to the end, therefore, that the said respondents and each of them may, if they can, show cause why your orators should not have the relief herein prayed for and may, but not upon their or either of their corporal oaths (an answer under oath being specially waived and not required), according to their and each af their best and utmost knowledge, recollection, information, and belief, full, true, and perfect answers make to the premises and to all and each of the several matters hereinbefore stated and charged as fully and particularly as if separately and severally interrogated as to each and every of said matters—

May it please your honors to grant unto your orators a writ of injunction, as well provisionally as perpetually, issuing out of and under the seal of this court, commanding, enjoining, and restraining the respondents, Emile Boesch and Martin Bauer, and each of them and their and each of their servants, agents, attorneys, and workmen and each and every of them, as is hereinbefore in that behalf prayed.

May it please your honors to grant unto your orators the writ of

subpœna issued out of and under the seal of this honorable court, directed to the said respondents, Emile Boesch and Martin Bauer, commanding them and each of them to be and appear in this honorable court by a day certain, according to the law and the
18 rules and practice, then and there to answer the premises and to stand to and abide such order and decree as may be made.

And your orators will ever pray, etc.

LANGHORNE & MILLER,
Solicitors for Complainants.

J. H. MILLER, *Of Counsel.*

Verification to Amended Bill of Complaint.

STATE OF CALIFORNIA, } ss:
City and County of San Francisco, }

Albert Graff, being duly sworn, deposes and says that he is one of the complainants in the above-entitled action; that he has read the foregoing amended bill and knows the contents thereof; that the same is true, of his own knowledge, except as to those matters which are therein stated on information or belief, and as to those matters that he believes it to be true; that he verily believes Schwintzer & Graff to be the original and first inventors of the invention claimed and described in the letters patent sued on.

ALBERT GRAFF.

Subscribed and sworn to before me this 16th day of October, 1886.

[SEAL.] F. O. WEGENER,
Notary Public.

Endorsed: Filed October 19, 1886. L. S. B. Sawyer, clerk.

19 *Subpœna.*

UNITED STATES OF AMERICA:

Circuit Court of the United States, Ninth Circuit, Northern District of California. In Equity.

The President of the United States of America to Emile Boesch and Martin Bauer, Greeting:

You are hereby commanded that you be and appear in said circuit court of the United States aforesaid, at the court-room in San Francisco, on the sixth day of December, A. D. 1886, to answer an amended bill of complaint exhibited against you in said court by Albert Graff, who is a citizen of the State of California, and J. F. Donnell, who is a citizen of the State of New York, and to do and receive what the said court shall have considered in that behalf; and this you are not to omit under the penalty of five thousand dollars.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 19th day of [SEAL.] October, in the year of our Lord one thousand eight hundred and eighty-six, and of our Independence the 111th.

L. S. B. SAWYER, *Clerk.*

Memorandum Pursuant to Rule 12, *Supreme Court U. S.*

You are hereby required to enter your appearance in the above suit, on or before the first Monday in December next, at the clerk's office of said court, pursuant to said bill; otherwise the said bill will be taken *pro confesso.*

L. S. B. SAWYER, *Clerk.*

20 (Endorsed.)

UNITED STATES MARSHAL'S OFFICE,
NORTHERN DISTRICT OF CALIFORNIA.

I hereby certify that I received the within writ on the 19th day of October, 1886, and personally served the same on the 19th day of Oct., 1886, by delivering to and leaving with Martin Bauer, said defendant named therein, personally, at the city & county of San Francisco, in said district, a certified copy thereof, and after diligent search I have been unable to find Emile Boesch, one of said defendants, in my district.

J. C. FRANKS,
U. S. Marshal,
By C. H. PETERSON, *Deputy.*

San Francisco, October 20th, 1886.

Filed October 20, 1886.

L. S. B. SAWYER, *Clerk,*
By F. D. MONCKTON,
Deputy Clerk.

Answer.

In the United States Circuit Court, Ninth Circuit, Northern District of California.

ALBERT GRAFF *et al.*, Complainants,
vs.
EMILE BOESCH *et al.*, Defendants. } In Equity.

Now come the said defendants and deny generally and specifically each and every allegation contained in complainants' bill of complaint on file herein.

Wherefore defendants pray to be hence dismissed with their reasonable costs and charges in this behalf sustained.

SCRIVNER & BOONE,
Solicitors for Defendants.

JOHN L. BOONE, *Of Counsel.*

21 (Endorsed:) Service of the within answer and receipt of copy thereof admitted this 3rd day of Jan., 1887. Lang-

horne & Miller, solicitors for compl. Filed 3rd day of January, A. D. 1887. L. S. B. Sawyer, clerk.

Replication.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

ALBERT GRAFF and J. F. DONNELL, Complainants,
vs.
EMILE BOESCH and MARTIN BAUER, Respondents.

The replication of Albert Graff and J. F. Donnell, complainants, to the answer of Emile Boesch and Martin Bauer, defendants.

These repliants, saving and reserving to themselves all and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereto saith that *he* will aver and prove *his* said bill to be true, certain, and sufficient in the law to be answered unto, and that the said answer of the said defendants is uncertain, untrue, and insufficient to be replied upon by these repliants without this, that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true; all which matters and things these repliants are and will be ready to aver *due* prove as this honorable court shall direct, and humbly pray as in and by *his* said bill *he hath* already prayed.

LANGHORNE & MILLER,
Sol's for Complainants.

(Endorsed:) Service of the within rep. is hereby admitted this 31 day of Jan., 1887. Scrivner & Boone, attorney for def'ts. Filed Jan'y 31, 1887. L. S. B. Sawyer, clerk, by F. D. Monckton, deputy clerk.

22 *Interlocutory Decree.*

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

ALBERT GRAFF and J. F. DONNELL, Complainants,
vs.
EMILE BOESCH and MARTIN BAUER, Respondents. } No. 4107.

At a stated term of the circuit court of the United States in and for the ninth judicial circuit, northern district of California, held at the court-room thereof, in the city and county of San Francisco, State of California, on Monday, the 3rd day of October, A. D. 1887, being a day of the July term of said court for 1887.

Present: Honorable Lorenzo Sawyer, circuit judge.

This cause having heretofore come on to be heard upon the amended bill of complaint of complainants, the answer of respondents thereto, the replication of complainants, and the proofs, oral, documentary, and written, taken and filed in said cause and now of

record, and having been argued by counsel for the respective parties and submitted to the court for its consideration and decision—

And the court having duly considered the same and being now fully advised in the premises—

It is ordered, adjudged, and decreed and the court doth hereby order, adjudge, and decree as follows, to wit:

That the letters patent of the United States granted and issued on the 4th day of December, A. D. 1883, to Carl Schwintzer and William Graff, of Berlin, Germany, assignors of one-half to J. F. Donnell & Co., of New York, numbered No. 289,571 and entitled
23 "lamp burner," and being the letters patent sued on herein, is good and valid in law; that the said Carl Schwintzer and William Graff were the joint, original, and first inventors of the inventions described in said letters patent and claimed, covered, and protected in and by the first claim thereof.

That Albert Graff and J. F. Donnell, the complainants herein, are the sole and exclusive owners and holders of said letters patent.

That Emile Boesch and Martin Bauer, the respondents herein, without the license or consent of complainants or either of them, at the city and county of San Francisco, State of California, and since the complainants became the owners and holders of said letters patent, have infringed upon the first claim of said letters patent and the exclusive rights and privileges of complainants under the same—that is to say, by selling lamp burners containing the invention and improvements covered, claimed, and protected in and by said first claim of said letters patent, as charged in the bill of complaint.

And it is further ordered, adjudged, and decreed that the complainants do have and recover of and from Emile Boesch and Martin Bauer, the respondents herein, the gains, profits, and advantages which they and each of them have made or received or which have arisen or accrued to them and each of them from and by reason of the infringement aforesaid, and also any and all damages which the complainants and each of them have suffered or sustained from and by reason of said infringement, together with costs of court.

And it is further ordered, adjudged, and decreed that the case be referred to S. C. Houghton, Esq., the master in chancery of this court, to ascertain, take, state, and report to this court an account of the number of lamp burners sold by respondents or either of them containing the invention claimed in and by the first claim of said letters patent, and also the gains, profits, and advantages which the said respondents and each of them have made or received or which have arisen or accrued to them and each of them since the 4th day of December, 1883, from and by infringing upon the first claim of said letters patent as aforesaid, and also the amount of damages which the complainants and each of them have suffered or sustained from and by reason of said infringement.

24 And it is further ordered, adjudged, and decreed that upon such accounting the complainants have the right to cause an oral examination under oath of Emile Boesch and Martin Bauer, the respondents, and each of them, and their agents, servants, clerks,

book-keepers, salesmen, and workmen and each of them, and any other witnesses necessary to take said accounting, and also the right to inspect and have produced before the master all books, vouchers, contracts, papers, and other documents belonging to or in the possession of or control of the respondents and each of them, and of the firm and copartnership business carried on by said respondents under whatever name the same may be conducted, showing or tending to show any matters or things material to the accounting.

And it is further ordered, adjudged, and decreed that Emile Boesch and Martin Bauer and each of them, their agents, servants, workmen, and employees, be, and they are hereby, forever and perpetually enjoined and restrained from making, using, or selling any lamp burner or other burner containing the invention claimed, covered, and protected in and by the first claim of said letters patent and from infringing upon the said first claim in any matter whatever.

Further ordered, adjudged, and decreed that complainants do have and recover from respondents their costs and disbursements so far incurred and heretofore taxed at $119.25, and such other and further costs as may be hereafter incurred.

LORENZO SAWYER,
Circuit Judge.

(Endorsed:) Filed and entered October 17, 1887. L. S. B. Sawyer, clerk.

25 U. S. Circuit Court, Northern Dist. of California.

ALBERT GRAFF
vs.
EMIL BOESCH *et al.* } 4107.

Master's Report in the Matter of the Reference for Accounting, Comprising Interlocutory Decree, Report, Testimony.

26 In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

ALBERT GRAFF and J. F. DONNELL, Complainants,
vs.
EMILE BOESCH and MARTIN BAUER, Respondents. } Interlocutory Decree. No. 4107.

At a stated term of the circuit court of the United States in and for the ninth judicial circuit, northern district of California, held at the court-room thereof, in the city and county of San Francisco, State of California, on Monday, the 3rd day of October, A. D. 1887, being a day of the July term of said court for 1887.

Present: Honorable Lorenzo Sawyer, circuit judge.

This cause having heretofore come on to be heard upon the amended bill of complaint of complainants, the answer of respondents thereto, the replication of complainants, and the proofs, oral,

documentary, and written, taken and filed in said cause and now of record, and having been argued by counsel for the respective parties and submitted to the court for its consideration and decision—

And the court having duly considered the same and being now fully advised in the premises:

It is ordered, adjudged, and decreed and the court doth hereby order, adjudge, and decree as follows, to wit: That the letters patent of the United States granted and issued on the 4th day of December, A. D. 1883, to Carl Schwintzer and William Graff, of Berlin, Germany, assignors of one-half to J. F. Donnell & Co., of New York, numbered No. 289,571 and entitled "lamp burner," and being the letters patent sued on herein, is good and valid in law; that the said Carl Schwintzer and William Graff were the joint, original, and first inventors of the inventions described in said letters patent and claimed, covered, and protected in and by the first claim thereof.

27 That Albert Graff and J. F. Donnell, the complainants herein, are the sole and exclusive owners and holders of said letters patent.

That Emile Boesch and Martin Bauer, the respondents herein, without the license or consent of complainants or either of them, at the city and county of San Francisco, State of California, and since the complainants became the owners and holders of said letters patent, have infringed upon the first claim of said letters patent and the exclusive rights and privileges of complainants under the same—that is to say, by selling lamp burners containing the invention and improvements covered, claimed, and protected in and by said first claim of said letters patent, as charged in the bill of complaint.

And it is further ordered, adjudged, and decreed that the complainants do have and recover of and from Emile Boesch and Martin Bauer, the respondents herein, the gains, profits, and advantages which they and each of them have made or received or which have arisen or accrued to them and each of them from and by reason of the infringement aforesaid, and also any and all damages which the complainants and each of them have suffered or sustained from and by reason of said infringement, together with costs of court.

And it is further ordered, adjudged, and decreed that the case be referred to S. C. Houghton, Esq., the master in chancery of this court, to ascertain, take, state, and report to this court an account of the number of lamp burners sold by respondents or either of them containing the inventions claimed in and by the first claim of said letters patent, and also the gains, profits, and advantages which the said respondents and each of them have made or received or which have arisen or accrued to them and each of them since the 4th day of December, 1883, from and by infringing upon the first claim of said letters patent as aforesaid, and also the amount of damages which the complainants and each of them have suffered or sustained from and by reason of said infringement.

And it is further ordered, adjudged, and decreed that upon such accounting the complainants have the right to cause an oral examination, under oath, of Emile Boesch and Martin Bauer, the respond-

ents, and each of them, and their agents, servants, clerks, bookkeepers, salesmen, and workmen, and each of them, and any other witnesses necessary to take said accounting, and also the right to inspect and have produced before the master all books,
28 vouchers, contracts, papers, and other documents belonging to or in the possession of or control of the respondents and each of them, and of the firm and copartnership business carried on by said respondents, under whatever name the same may be conducted, showing or tending to show any matters or things material to the accounting.

And it is further ordered, adjudged, and decreed that Emile Boesch and Martin Bauer and each of them, their agents, servants, workmen, and employees, be, and they are hereby, forever and perpetually enjoined and restrained from making, using, or selling any lamp burner or other burner containing the invention claimed, covered, and protected in and by the first claim of said letters patent and from infringing upon the said first claim in any matter whatever.

Further ordered, adjudged, and decreed that complainants do have and recover from respondents their costs and disbursements so far incurred and heretofore taxed at $119.25, and such other and further costs as may be hereafter incurred.

(Signed) LORENZO SAWYER,
Circuit Judge.

(Endorsed:) Filed and entered October 17, 1887. L. S. B. Sawyer, clerk.

I, L. S. B. Sawyer, clerk of the circuit court of the United States for the northern district of California, do hereby certify the foregoing to be a full, true, and correct copy of an interlocutory decree filed and entered October 17th, 1887, in the cause entitled Alfred Graff *et al. vs.* Emile Boesch *et al.*, No. 4107, in said circuit court.

Attest my hand and the seal of said circuit court this
[SEAL.] 25th day of April, A. D. 1888.

L. S. B. SAWYER, *Clerk.*

29 In the Circuit Court of the United States, Ninth Circuit, in and for the Northern District of California.

ALBERT GRAFF
vs.
EMILE BOESCH *et al.*

In the matter of the reference to the master for accounting.

Master's Report.

To the honorable circuit court of the United States for the ninth circuit and northern district of California:

In pursuance of the decretal order of this honorable court filed and entered in the above-entitled cause on the 17th day of October, 1887, directing the undersigned, as master in chancery of said court,

to ascertain, take, state, and report to this court an account of the number of lamp burners sold by respondents or either of them containing the inventions claimed in and by the first claim of said letters patent, and also the gains, profits, and advantages which the said respondents and each of them have made or received or which have arisen or accrued to them and each of them since the 4th day of December, 1883, from and by infringing upon the first claim of said letters patent as aforesaid, and also the amount of damages which the complainants and each of them have suffered or sustained from and by reason of said infringement. I, the said master, having been attended at several times by the counsel for the respective parties to said cause, and having taken the testimony of the several witnesses produced in this behalf, and having examined the said testimony and the other evidence submitted, do hereby and herewith report said testimony and the exhibits introduced in connection therewith, and do also report—

Mr. Boesch, one of the respondents, was the only witness
30 introduced on behalf of respondents. From his testimony it appears that about the first of January, 1886, he purchased and put upon the market an invoice of lamp burners, comprising fifty with caps like Complainant's Exhibit "C," and one hundred with half caps of the style represented by Complainant's Exhibit 12-Wick Burner; that after having sold but four of the capped burners he was notified that he was infringing complainant's patent, and he thereupon altered the remainder of the 50 capped burners and converted them into the half-capped style; that about a year later he obtained a second invoice, consisting entirely of capped burners, two hundred in number; that of these he sold ten without alteration, changing all of the remainder which he sold, either converting them into half-capped burners or removing the cap altogether.

Although, according to this testimony of respondent, but four of the capped burners of the first lot were sold, and all of the remainder sold must therefore either have been the half-capped burners imported or half-capped burners made by removing a portion of the cap, yet respondents' entire sales seem to have been sufficient to justify them in sending for a second invoice.

It seems unaccountable that in procuring a fresh supply only capped burners should have been ordered, if so few capped burners had been sold and if no further violation of complainant's rights under his patent had been contemplated. It is difficult to understand why the respondents should purchase burners requiring the labor and expense of alteration to make them a kind which they believed themselves entitled to sell, when they could just as readily and at no greater cost have procured burners of that identical kind, as they had theretofore done.

Besides, it is admitted that ten of the burners of the second invoice were sold without alteration.

The chief feature of the patented invention was the cap, and the half-capped burners is probably as much an infringement as the respondents' capped burner. Mr. Boesch insists most vigorously

that the cap is a nuisance, and that burners from which the caps have been entirely removed are superior to those of complainant, and he states that burners of that class were in general public use long before the date of the patent in suit.

31 If these assertions are true the infringement was wanton and without excuse. It is apparent that the removal of the entire cap would have required less care and would have been attended with less labor than the removal of a portion of the cap, and would have given respondents a burner which they had an unquestionable right to sell.

The evidence shows that the infringement was a wilful and persistent violation of the rights secured to complainant by his patent.

That material injury resulted to complainant's lamp-burner trade from the infringement of respondents there can be no doubt. It is an admitted fact that complainant was at all times in a position to supply the demands of the trade for burners of this class, and the testimony clearly shows that in many cases the loss of sales by complainant was directly attributable to the infringement.

By the testimony of complainant and his wife, who is his clerk and book-keeper, it is shown that complainant introduced his patented burners to the trade in the fall of 1883 and that the goods found a ready market, his sales prior to the time of the commencement of the sale of the infringing burners amounting to six or seven thousand, and his entire sales up to the latter part of the year 1887 aggregating some ten or twelve thousand; that he granted no licenses; that upon introducing the patented article he fixed upon a schedule of prices, which prices were maintained until some time in the spring of 1886, when, because of the introduction and sales of respondents' lower-priced infringing burners, complainant's trade fell off, and he was compelled to reduce and did reduce both his wholesale and his retail prices.

It is a fact of common knowledge that there is to be found on sale in the market a great variety of lamp burners, among which, as shown by the evidence, have been for many years burners of the same general class as complainant's. In view of this fact, the large number of sales made by complainant at high prices to a limited trade affords sufficient proof that the efficiency and marketability of his burners were due to his patent improvement.

This, then, is a case where the owner of the patent granted no licenses and had no established license fee, but supplied the

32 demand for the burner himself, and was able to supply that demand. He waives claim to the infringers' profits and confines his claim to the enforced reduction of price on the burners, which he (complainant) sold, caused by the infringement.

"That this is a proper item of damages, if proved, is clear. It is a pecuniary injury caused by the infringement and is the subject of an award of damages, although the defendant may have made no profits and the plaintiff may have had no established license fee. As the plaintiff, at the time of the infringement, availed himself of his exclusive right by keeping his patent a monopoly and granting no licenses, the difference between his pecuniary condition after the

infringement and what his condition would have been if the infringement had not occurred is to be measured, so far as his own sales are concerned, by the difference between the money he would have realized from such sales if the infringement had not interfered with such monopoly and the money he did realize from such sales. If such difference can be ascertained by proper and satisfactory evidence, it is a proper measure of damages. The damages to be recovered (Rev. Stat., sections 4919 and 4921) are 'actual damages,' and they may properly include such losses to the plaintiff as were allowed in this case," to wit, the losses incurred by reason of such enforced reduction in the patentee's prices.

Yale Lock M'f'g Co. *v.* Sargent, 117 U. S., 552.

The cap was the essential feature of the Graff burner. The respondent adopted Graff's arrangement and then reduced the price of the burner, forcing Graff to do the same in order to hold his trade. The evidence shows that the reduction in prices by Graff was solely due to the respondent's infringement. So far as the evidence shows, the only competitor with Graff in the use of his cap arrangement, during the period covered by the accounting, was the respondent.

After the reduction in his prices complainant sold, at wholesale, one thousand three hundred and twelve ten-wick burners at a price twenty-five cents less on each than than his original price; four hundred and fifty twelve-wick burners at fifty cents less; five hundred and ninety-two sixteen-wick burners at seventy-five cents less, and seven hundred and sixteen twenty-wick burners at seventy-five cents less—a total difference between the original and the re-
33 duced prices of one thousand five hundred and thirty-five dollars and fifty cents.

In addition, he sold at retail, on an average, five burners on each of the five hundred and seventy-four business days between the time when his prices were first reduced and October 31st, 1887, the number of burners thus sold being two thousand eight hundred and seventy, which were sold at a minimum reduction of fifty cents each under original prices—a total difference between the original and the new prices of fourteen hundred and thirty-five dollars; which sum, added to the said sum of one thousand five hundred and thirty-five dollars and fifty cents, gives an aggregate amount of two thousand nine hundred and seventy dollars and fifty cents.

I therefore find and do report that the number of lamp burners proven to have been sold by respondents, containing the invention claimed in and by the first claim of complainant's letters patent, is fourteen, provided that only the capped burners sold contain said invention, and that the number is one hundred and fourteen if the half-capped burners so sold are to be held to contain said invention; that complainant waives claim to any and all of the gains, profits, and advantages which said respondents have received or which have arisen or accrued to them from and by infringing upon said first claim of said letters patent, and that the amount of damages which the complainant has suffered and sustained from and by

reason of said infringement is two thousand nine hundred and seventy dollars and fifty cents.

Respectfully submitted,

S. C. HOUGHTON, *Master, &c.*

Ap'l 30, '88.

34 In the Circuit Court of the United States, Ninth Circuit, in and for the Northern District of California.

ALBERT GRAFF
vs.
EMILE BOESCH *et al.*

In the matter of the reference to master for accounting.

WEDNESDAY, *November 16th*, 1887.

Present: Mr. Miller, of counsel for complainant; Mr. Boone, of counsel for respondents; Mr. Boone, respondent.

(The taking of testimony herein is continued, in conformity with agreement of counsel, until Monday, the 21st instant, at two o'clock p. m.)

MONDAY, *November 21st*, 1887.

Present: Mr. Miller, of counsel for complainant; Mr. Boone, of counsel for respondents.

Examination-in-chief of EMILE BOESCH on behalf of complainant (by Mr. MILLER):

Q. 1. You are one of the respondents in this suit, are you?

A. Yes, sir.

Q. 2. What is the name of your firm?

A. Emile Boesch & Co.

Q. 3. Who is the company?

A. Myself and Martin Bauer.

Q. 4. You two compose the firm?

A. Yes, sir.

Q. 5. And you are engaged in the business of selling lamps, lamp burners, and chimneys and things of that kind in this city, are you?

A. Yes, sir.

Q. 6. Have you sold or has your firm sold any of the Diamond burners which were the subject-matter of this suit?

A. Yes, sir.

Q. 7. When did you commence to sell them?

A. I imported the first about the first of January, 1886.

35 Q. 8. Was that the date you got the first invoice?

A. Yes, sir.

Q. 9. Have you got that invoice here with you?

A. I think that is one of the invoices that has been filed in this case. It might have been the latter part of December, 1885, or the first of January, 1886, that I got the first invoice.

Q. 10. Where did you get these Diamond burners from at that time?

A. From a firm at Berlin, Germany.

Q. 11. What firm?

A. The first lot I got I don't remember the name of the firm.

Q. 12. How many did you get at that time?

A. The word "Diamond," I want you to understand, is the name of a burner that somebody might give to any burner. The original name of this burner was the Mitrailleuse burner, and has been known by that name for fifteen years and they call it by that name.

Q. 13. How many of them did you get at that first invoice?

A. I got only fifty burners of the kind held to be an infringement—fifty with caps, I mean.

Q. 14. You had fifty with caps at that time?

A. Yes, sir; in that lot.

Q. 15. What was the size of those fifty burners?

A. Those were what we call number thirty. I believe they had twenty wicks, if I am not mistaken.

Q. 16. All of those burners were twenty-wick burners, then?

A. Yes, sir.

Q. 17. Did you get any other Mittrailleuse burners by that same invoice?

(Question objected to by respondents as irrelevant and immaterial.)

Q. 18. Did you get any other Mittrailleuse burners by that same invoice, excepting such as had caps?

A. I had fifty number fourteen and fifty number eighteen without caps. No. 14 burners had twelve wicks and the No. 18 burners had sixteen wicks. I produce a sample of the No. 14 burner, to which I have referred.

Q. 19. Is this burner which you have just produced a sample of the twelve-wick burners you got at that time?

A. Yes, sir.

Q. 20. And were the sixteen-wick burners which you got at that time similar to this, so far as the cap part of it is concerned?

A. Yes, sir.

36 Q. 21. The only difference being in the number of the wicks?

A. Yes, sir.

(Complainant introduces in evidence the burner above referred to, marked "Complainant's Exhibit 12-Wick Burner.")

Q. 22. What was the next invoice you got after that?

A. That came here a year later, while I was in Europe.

Q. 23. What date?

A. About one year later than the first invoice, which would be this last January, 1887, about.

Q. 24. Just state what kind of Diamond burners you got by that invoice and how many.

A. At that time we had one hundred sixteen-wick burners with caps.

Q. 25. Now, you got one hundred sixteen-wick burners with caps. Now, did you get any at that time similar to "Exhibit 12-Wick Burner?"

A. No, sir; I have prepared a written statement from my books which shows all these things you are trying to get at.

Q. 26. You are positive that with this second invoice you only had one hundred Metrailleuse burners?

A. I didn't state that. I received one hundred sixteen-wick burners and one hundred twenty-wick burners.

Q. 27. Then you got two hundred burners in all with that invoice?

A. Yes, sir.

Q. 28. Were those caps on them?

A. The same as the one which has been held to be an infringement.

Q. 29. You didn't get any at this time with those half caps like "Exhibit 12-Wick Burner," did you?

A. No, sir.

Q. 30. Did you get any in any invoices after that?

A. No, sir.

Q. 31. Now, going back to the first invoice, what did you do with the fifty twenty-wick burners that had caps on them?

A. At the time that I received notice that they were infringements I altered them. Previous to that time I had sold four of them.

Q. 32. To whom did you sell the four burners?

A. I don't know. They were sold for cash.

Q. 33. How did you alter them?

A. I altered and made them the same as "Exhibit 12-Wick Burner."

37 Q. 34. What did you do with those you altered?

A. I sold them.

Q. 35. All of them?

(Mr. BOONE:) I object on the ground that it is immaterial whether he sold them or not.

(The MASTER:) The testimony will be taken subject to the objection.

Q. 36. So you sold all of those fifty burners after you had altered them?

A. I sold forty-four of those which had been so altered. They were of the same style as the burner "Exhibit 12-Wick Burner."

Q. 37. Had you sold the other six which made up that fifty?

A. I had sold four.

Q. 38. You sold four just as they were?

A. Yes, sir.

Q. 39. And then you altered the remainder and sold forty-four after they were altered?

A. Yes, sir.

Q. 40. What did you do with the other two burners?

A. I don't know. I know that I took some burners to Mr. Boone's office and left them there.

Q. 41. What did you do with the fifty twelve-wick burners and the fifty sixteen-wick burners that you got by the first invoice which were like "Exhibit Twelve-Wick Burner?"

(The same objections by respondent.)

A. I sold twelve of the twelve-wick burners without caps of that lot and I sold forty-four of the sixteen-wick burners.

Q. 42. What became of the rest of those burners of that invoice? You say you sold twelve of the twelve-wick burners and forty-four of the sixteen-wick burners. What became of the others?

A. They are around the shop. That is all that I could find that I sold.

Q. 43. Where are the others?

A. They are on hand now. A few might be missing.

Q. 44. Now, in regard to the second invoice, what did you do with the one hundred sixteen-wick burners with caps that you got by that invoice?

A. Most of them are on hand.

Q. 45. How about the twenty-wick burners?

A. Most of them are on hand. When I say most I mean nine-tenths.

38 Q. 46. Did you sell any of them?

A. I sold four of those twenty-wick burners and sold six of the sixteen-wick burners in that lot.

Q. 47. Did the four twenty-wick burners and the six sixteen-wick burners have the caps on them when you sold them?

A. Yes, sir.

Q. 48. What became of the rest of the burners of that lot?

A. They are most of them on hand now.

Q. 49. You say most of them are on hand?

A. Well, I mean nine-tenths.

Q. 50. What became of the other tenth?

A. I have altered some of them to a style which I call the "E. Boesch" style, a sample of which I now produce.

(The sample above referred to is introduced in evidence by complainant and marked "Complainant's Exhibit Boesch Burner.")

Q. 51. How many of them did you alter to the "Boesch burner?"

A. I couldn't say how many of them I altered, but we altered them as fast as we sold them. I sold three of the sixteen-wick burners altered in that way and six of the twenty-wick burners altered in that way.

Q. 52. And the rest you have in stock, I suppose?

A. Yes, sir; except a few that might be lost.

Q. 53. Have you got a statement of the cost to you of those various burners and the profits that were made on them?

A. Yes, sir.

Q. 54. What did the sixteen-wick burners cost you in this way?

A. The sixteen-wick burners cost me one dollar each.

Q. 55. And what did you sell them for?
A. Two dollars and a half each.
Q. 56. What did the twelve-wick burners cost you?
A. The twelve-wick burners cost me seventy-five cents each.
Q. 57. And what did you sell them for?
A. Two dollars each.
Q. 58. And what did the twenty-wick burners cost you?
A. One dollar and sixty-five cents each.
Q. 59. And what did you sell them for?
A. Three dollars and a half each. All of the different styles were of one cost price and were sold at the same price.
39 Q. 60. Have you in your possession now any Metrailleuse burners with caps on them which were decided to be an infringement?
A. Yes, sir; some that have not been altered yet.
Q. 61. How many of those?
A. I couldn't tell. I haven't counted them.
Q. 62. You stated that you altered them as you sold them?
A. Yes, sir; altered about half a dozen at a time, and when we were short of them we altered more.
Q. 63. And those that you have on hand and haven't sold you have not altered yet, but you will alter them when you sell them. Is that the idea?
A. Some of them are not altered yet.
Q. 64. I want to get at how many you have on hand that are not altered and how many you have that are altered.
A. Well, I don't know. I was not told to bring such a statement.
Q. 65. Did you advertise those "Diamond" burners for sale?
A. Not to my knowledge.
Q. 66. Did you advertise the Metrailleuse burners for sale?
A. Not to my knowledge.
Q. 67. Did your partner do it or not?
A. That I can't tell. I was absent from this city during the whole of the year 1886. If there should be any advertising it would be on my cards and on bill-heads. There were no advertisements put in the newspapers.
Q. 68. Look at the card now shown you and state if that is your card.
A. We did no newspaper advertising, but on our business cards we had the statement, among other articles, "Diamond coal-oil burners."
Q. 69. Is that card which I have just handed you one of your cards?
A. Yes, sir.
Q. 70. Are you using that kind of a card now?
A. No, sir. It is "E. Boesch & Co." now.
Q. 71. This is "Emil Boesch" on this card, is it?
A. Yes, sir.
Q. 72. When did you change to this firm?
A. Changed before I went to Europe.

Q. 73. Do you know when you issued this card I have shown to you?

A. No, sir; I couldn't tell until I looked the bill-heads over.

(The card above referred to is introduced in evidence by complainant and marked "Complainant's Exhibit Defendant's Business Card.")

Q. 74. Did you sell any Diamond Metrailleuse burners to the Alta Publishing Company in this city?

A. I couldn't tell to whom they were sold.

Q. 75. Look at this bill I now hand you and see if that came from your house.

A. That is my bill-head.

Q. 76. Did you sell that bill of goods to the Alta Publishing Company at or about the date of the bill?

A. That is one of my bill-heads, and no doubt the things have been sold. I don't keep my books in my brains. Yes; that is one of my bills.

(The bill above referred to is introduced in evidence by complainant and marked "Complainant's Exhibit Defendant's Bill.")

Mr. BOONE: We object to that as immaterial and irrelevant.

The MASTER: The testimony will be taken subject to the objection.

Q. 77. Did you sell any Metrailleuse burners to a saloon at Menlo Park?

A. I couldn't tell where they go to.

Q. 78. Did you sell any such burners to a saloon at Mayfield?

A. I couldn't tell.

Q. 79. Did you sell any such burners to the Catholic church over in Oakland?

A. I couldn't tell.

Q. 80. Or to the Examiner Publishing Company here, in this city?

A. I don't know.

Q. 81. Did you sell any to the firm of Nathan and Company, in this city and county?

A. I don't know.

Q. 82. Did you sell any up at Benicia, that you can think of?

A. No, sir.

Q. 83. Did you sell any up at Portland, Oregon, that you can think of?

A. No, sir.

Q. 84. Are you acquainted with the Burns Lantern Company, of Portland, Oregon?

A. No, sir.

Q. 85. Are you acquainted with any person in the lamp business in Portland?

A. No, sir; I might be, but I don't know now.

41 Q. 86. Are you acquainted with the firm of Old and Summers, at Portland?

A. Not that I know of.

Q. 87. Well, I wish you would make a memorandum of those things that I have asked you and refer to your books and let us know about them.

A. If it is sold on time it will appear on my books, but if it is a cash sale it won't.

Q. 88. Do you enter your cash sales in any book?

A. Not in name—not the details. Most of the things are entered, and when I sold these Metrailleuse burners for cash most of them were entered.

Q. 89. Did you get any Metrailleuse burners from any other place than from Germany?

A. I bought, in this city, from a party who claimed to be connected with the firm of Hatton and McFadden, one dozen burners of the same style of those sold by Mr. Graff.

Q. 90. What was this man's name, do you know, that you bought the dozen burners from?

A. McFadden and Hatton.

Q. 91. Was he a drummer from the firm of McFadden and Hatton?

A. I believe he was one of the partners.

Q. 92. And he was out here selling these burners?

A. Yes, sir.

Q. 93. And you bought a dozen burners of him?

A. Yes, sir.

Q. 94. What did you do with those dozen burners?

A. When I knew that I couldn't sell them I wrote to them that I wouldn't buy them, and didn't pay for them.

Q. 95. What became of them?

A. They sent me an order to deliver them to B. Nathan and Company without consideration, and I have a receipt for it.

Q. 96. Who did you get the receipt from; from Nathan and Company?

A. Yes, sir.

Q. 97. What kind of a receipt was it?

A. A receipt that I received from them.

Q. 98. Was it a bill?

A. No, sir.

Q. 99. What was it, then?

A. It was a receipt I received from them.

Q. 100. Of course, you don't know what Nathan and Company did with them?

A. No, sir; that is none of my business.

42 Q. 101. Do you know whether this man sold burners to anybody else here in this city or not?

(Question objected to by respondent and withdrawn.)

Q. 102. Did you get any other Metrailleuse burners from any other source except these you have stated?

A. I bought a half a dozen ten-wick burners from B. Nathan and Company.

Q. 103. When was that?

A. I couldn't tell you. It was about in 1886.

Q. 104. What did you do with them?

A. They were lying around my shop, except one, which was sold.

Q. 105. How did you come to buy those?

A. Like any other burner I am buying—that is, in the ordinary course of trade.

Q. 106. Did they have caps on them?

A. No, sir.

Q. 107. What kind of burners were they?

A. We called them the Edward Miller and Company burner.

Q. 108. Those Miller burners are made in New York, are they not?

A. They have an office in New York and one in Meriden, Connecticut.

Q. 109. You didn't buy any Metrailleuse burners in New York from Edward Miller?

A. No, sir.

Q. 110. Describe this Miller burner. Is it like any of these burners we have here?

A. I have one here, which is a sample of it, and I now produce it.

(The sample above referred to is introduced in evidence by complainant and marked "Complainant's Exhibit Miller Burner.")

Q. 111. What did you pay for that half-dozen ten-wick burners that you got from New York?

A. I believe the price is nine dollars a dozen.

Q. 112. At what rate did you sell them?

A. The one I sold was for a dollar and a quarter.

Q. 113. And the others you have around your place now?

A. Yes, sir; except some of them may be lost.

Q. 114. Are any of them lost?

A. I can't tell. I know that I brought several to Mr. Boone's office and never got them back.

Q. 115. Then you don't know what has become of the others?

43 A. I think they are at the shop.

Q. 116. All of them?

A. Pretty near.

Q. 117. Have you bought any Metrailleuse burners excepting those you have testified to?

A. No, sir.

Q. 118. The half-dozen Miller burners from New York and then the one dozen from Hatton and McFadden, which you turned over to Nathan and Company, and then those two invoices which you have testified to are all that you have had?

A. Yes, sir.

Cross-examination of EMIL BOESCH (by Mr. BOONE):

Q. 1. You carry quite a large stock of lamps, don't you, Mr. Boesch?

A. Yes, sir.

Q. 2. Do you know how many different styles of burners you carry in stock?

A. Styles and sizes, I think we could find one hundred varieties.

Q. 3. How about the names of burners; are there many of different names?

A. A very large variety.

Q. 4. How long have you known this multiple-tube burner?

A. It must be four or five years.

Q. 5. By what name have you known it?

A. Metrailleuse.

Q. 6. Do you know how it got the name of "Diamond" burner?

A. I believe the chimneys are marked "Diamond."

Q. 7. Do you know whether there is any burner in the market called the "Diamond" burner?

A. There is a Diamond burner in the market made by Edward Miller.

Q. 8. How long has that been on the market?

A. About ten years.

Q. 9. How long have you had it for sale in your stock?

A. About that time—ten years.

Q. 10. Had it most all the time?

A. Yes, sir.

Q. 11. Call them by the same name as Mr. Graff calls this Metrailleuse burner?

A. Yes, sir; about that—"Diamond" or "Diamond Light."

44 Q. 12. When you sold it how did you mark it down on your books—by what name, "Diamond" or "Diamond Light," or what?

A. The Diamond burner.

Q. 13. You didn't testify in this main case in court, did you?

A. No, sir.

Q. 14. Why not?

A. I was not present.

Q. 15. Were you present at any time during the pendency of this suit?

A. No, sir; it was begun while I was away.

Q. 16. You say, Mr. Boesch, that you have sold some of the Metrailleuse burners with caps, such as are made by Schwintzer and Graff?

A. Yes, sir.

Q. 17. Did you ever sell any burners like the Schwintzer and Graff burners without the corrugations?

A. I have sold four burners of the kind which we bought from Germany from Hecht, a sample of which is in evidence in the main case. Those burners have the corrugations without a rim.

Q. 18. Now, you sold none of those with the full cap, such as was manufactured by Schwintzer and Graff?

A. No, sir.

Q. 19. But you have sold four of the Hecht burners with the corrugations on the inside?

A. Yes, sir. I have sold the number I have already stated.

Q. 20. Then you have sold a number of those called the Miller burner?

A. Yes, sir.

Q. 21. Then also you say you have sold some of the "Boesch improved" burners?

A. Yes, sir.

Q. 22. Was there any difference in the selling price of any of these burners?

A. No, sir.

Q. 23. How about the burner called "Complainant's Exhibit Boesch Burner;" was there any difference in the selling price of them and the others?

A. No, sir.

Q. 24. Was there any demand for burners with a cap—for the Metrailleuse burner with a cap?

A. No, sir.

Q. 25. Did you ever have anybody ask you for a Metrailleuse burner with a cap on it?

A. No, sir.

45 Q. 26. Did you ever have anybody ask you for a Schwintzer and Graff Metrailleuse burner?

A. No, sir.

Q. 27. How about the selling quality of the "Boesch" burner, the one marked in evidence here "Complainant's Exhibit Boesch Burner," and the burner which you bought from Hacht. Is there any difference in the selling quality of them?

A. No, sir.

Q. 28. Are there any peculiar advantages which would make one better than the other? Which is considered the best, the "Boesch improved" burner or the "Hecht" burner?

A. I think the "Boesch" burner is the best.

Q. 29. Any difference in the quality of the light made by them?

A. I think the "Boesch" burner gives a whiter light and a better light.

Q. 30. You say you bought from McFadden and Hatton one dozen burners?

A. I didn't buy them, because I never paid for them.

Q. 31. How came you to have them in your possession?

A. Well, they were sent to me, and as soon as I knew that I couldn't sell them I didn't pay for them.

Q. 32. They were sent to you by the firm of Hatton & McFadden?

A. Yes, sir.

Q. 33. And afterwards you were notified that they were an infringement, were you?

A. Yes, sir.

Q. 34. And as soon as you were notified that they were an infringement you notified Hatton & McFadden?

A. Yes, sir.

Q. 35. And by their order you turned them over to Nathan and Company?

A. Yes, sir.

Q. 36. And took a receipt for them?

A. Yes, sir.

Q. 37. Do you know how long this Miller burner has been on the market?

A. Four or five years. I couldn't tell exactly how long.

Q. 38. How long since you first saw them?

A. It must be within four years—about four years.

Q. 39. Do you know whether or not they are generally sold by lamp manufacturers throughout the country?

A. I believe they are. They are entered in their business catalogues or illustrated catalogues.

46 Q. 40. Do you know whether or not, prior to this suit, Mr. Graff claimed that they were an infringement on this patent of complainant's?

A. To my personal knowledge, he never said a word.

Q. 41. During the time you were selling these burners was Mr. Graff in your employ?

A. No, sir; none of the time.

Re-examination of EMIL BOESCH (by Mr. MILLER):

Q. 1. Did Mr. Graff use to work for you?

A. Yes, sir.

Q. 2. When did you go to Europe the last time?

A. About the first of January, 1886.

Q. 3. And when did you return from the trip that you made to Europe about the beginning of 1886?

A. About six weeks ago.

Q. 4. Now, you say you think the "Boesch improved" burner is better than the Graff burner?

A. Yes, sir.

Q. 5. How long have you been in business?

A. Twenty years.

Q. 6. Here and in Europe also?

A. Yes, sir.

Q. 7. Did you ever see a burner exactly like the "Boesch improved" burner prior to the time the Schwintzer & Graff burner was invented?

A. No, sir.

Q. 8. You are familiar with the burner trade and lamp trade, are you?

A. Yes, sir.

Q. 9. Don't you know, as a matter of fact, that prior to the issuance of the Schwintzer & Graff patent there was on the market a burner identically like the "Boesch improved" burner, as you call it—that is to say, a Metrailleuse burner with a band around the

wick tubes, with no cap on it—or that it was attempted to be introduced into use, and that it was a failure and never amounted to anything; don't you know that was a fact?

A. No, sir.

Q. 10. Don't you know, further, that in order to remedy that defect this cap was gotten up, and that then with the cap that
47 burner turned out to be a perfect success?

A. No, sir.

Q. 11. Do you know what the use of the cap is?

A. It is a nuisance.

Q. 12. Then you think it has no use?

A. Not in the quantity of light.

Q. 13. Is it of any use in any way?

A. I couldn't find out any use in the sale of the burners.

Q. 14. Do you know, as a scientific fact, what the cap accomplished in the Schwintzer & Graff burner?

A. They claim it makes a better light, and I claim that it doesn't.

Q. 15. Why doesn't it make a better light?

A. Because it stops the draft. There is too much cap on it.

Q. 16. Then your idea is that if it didn't have a cap on it it would be a better burner?

A. Well, it depends. There is a contrivance in the center of the burner which regulates the draft. The contrivance in the Graff burner is different from that in the Boesch burner.

Q. 17. Would the Graff burner be better with or without a cap?

A. I didn't test it.

Q. 18. Do you know?

A. I don't know.

Q. 19. Would the "Boesch improved" burner be better with or without a cap?

A. I have submitted already that I think it is the best without the cap.

Q. 20. Where did you get this Boesch burner from, as you call it?

A. I explained that.

Q. 21. It was one of the Graff burners changed?

A. That is a Hecht burner changed.

Q. 22. Is not that made like the Graff burner?

A. No, sir; the Graff burner has a solid cap and the Hecht burner has a cap with the corrugations on the inside.

Q. 23. Are not the two burners the same, with the exception of the construction of the cap?

A. If you are particular about the items, they are not, but as to principles they are the same.

Q. 24. This burner marked "Complainant's Exhibit Boesch
48 Burner," which I hold in my hand now, originally had a cap on it, didn't it?

A. No, sir; it was made like the Hecht burner. That was a Hacht burner.

Q. 25. They were the ones that Graff sued you on as being an infringement in this case, were they not?

A. Yes, sir.

Q. 26. Now, would this burner be better with or without a cap?
A. At present I prefer it that way—without a cap.
Q. 27. Why do you prefer it without a cap?
A. Because I like the light better.
Q. 28. Then it is better now than it was with the cap?
A. I think it is better.
Q. 29. Then why was it that you sold them with the caps and never took the caps off until you were enjoined?
A. Because they were sent to me with caps.
Q. 30. Why did you alter those burners?
A. Because they were after the suit was commenced, and I wanted to keep out of lawsuits.
Q. 31. Then it was because this was an infringement?
A. Yes, sir; and I wanted to keep out of lawsuits.
Q. 32. Is that the reason you altered the burners?
A. I experimented with it and found that it gave a better light without this cap.
Q. 33. Did you alter it because you experimented with it and found that it gave a better light without the cap or did you take off the cap because you were enjoined in this case?
A. I found that they would burn better without the cap.
Q. 34. You didn't alter them until after this suit was commenced, did you?
A. After the suit was commenced against me I altered the burners.
Q. 35. Did you ever see imported here from Germany one of these burners like this burner, "Exhibit Boesch Burner," without a cap to it?
A. No, sir.
Q. 36. None of them ever came here in that shape, but they came here with caps on, and you took the caps off. Is that it?
A. Yes, sir.
Q. 37. Now, with regard to these Hatton & McFadden burners, you say that one of the members of this firm came over here himself into your shop?
49 A. I believe so.
Q. 38. And he sold you a dozen burners?
A. Yes, sir.
Q. 39. What arrangement did you make with him, if any? You were to take them and pay for them at some future time?
A. He sold me the goods.
Q. 40. How long after that was it that you found out they were claimed to be an infringement?
A. When Graff sent me notice. It must have been before sixty days before they were paid for.
Q. 41. And when you found out that they were an infringement you wouldn't pay for them?
A. No, sir; I left them subject to Nathan's order.
Q. 42. You say you believe the Miller burners are sold generally by the trade?
A. Yes, sir.

Q. 43. When was the first time that you ever heard of a Miller burner being sold?

A. About four years ago.

Q. 44. Where was it?

A. In this city.

Q. 45. Who was selling them?

A. I believe it was Yates & Company, where I understood that the agent had sold one hundred dozen or were talking about selling one hundred dozen.

Q. 46. Is that all you know about them?

A. Yes, sir.

Q. 47. Do you consider the Miller burner to be better than the Boesch improved burner?

A. No, sir.

Q. 48. Which do you consider to be the best?

A. The Boesch improved burner.

Q. 49. Do you consider the Miller burner to be better than the Graff burner?

A. There is a question of contrivance in it—that is, a question of contrivance. There is a defect in the contrivance of the Miller burner. As you have it here, in the middle, it is just as good; but when you come to put the contrivance in the center which regulates the draft, then there is a defect in the Miller burner.

Q. 50. Is it any better than the Graff burner?

A. I didn't test it to see any difference.

Q. 51. What kind of a test did you make with the Boesch burner?

A. Well, I lighted it.

50 Q. 52. When was it that you made this test which you say proved that the Boesch burner was better than the Graff burner?

A. Four or six weeks ago.

Q. 53. Are you certain that you made the test since you came back from Europe?

A. Yes, sir.

Q. 54. You made a test simply by lighting the burners and taking off the cap?

A. Yes, sir; and I am a pretty good judge about those things.

Q. 55. And your judgment is that it is better without a cap than with it?

A. Yes, sir.

Q. 56. And you think the reason why it is better is because it has more draft?

A. Yes, sir; but it depends all the time upon the contrivance they put into the center.

Q. 57. You mean the contrivance through the center?

A. The contrivance is on the outside and on the inside too.

Q. 58. The advantage in the Boesch burner does not come from the cap, but from the other arrangements?

A. In all these burners it depends on the contrivance.

Q. 59. Now, suppose you had two burners here, one of them exactly like this one, the Boesch improved burner, and one exactly

like the Boesch improved burner, except that it had a cap on it exactly like the cap on the Graff burner, then which would be the best burner?

Mr. BOONE: I object to the question on the ground that it is misleading and immaterial.

The MASTER: The testimony will be taken subject to the objection.

A. The Boesch burner is the best.

Q. 60. That is, if you were to put a cap on the Boesch burner it would not be as good as the burner would be without a cap?

A. I think it is better as I have it.

Q. 61. And that is because it had more draft in it?

A. And it has more draft where it ought to be.

Q. 62. Then it is because you have more draft?

A. No, sir; I don't say that; it depends on how you regulate the draft.

51 Q. 63. I ask you in regard to a burner constructed like it is. You say it is better because it has a better draft. Does the more draft you get into a burner constructed like the Boesch burner make a better burner; is that the idea?

A. The way I use it the better it is.

Q. 64. What did you do to accomplish that? To make it a better burner you simply took off the cap, didn't you?

A. Took off the cap and experimented.

Q. 65. You simply took off the cap and it made it a better burner?

A. Yes, sir.

Q. 66. You got those burners already manufactured and then took off the cap, and then you say it is better than the other burner?

A. Yes, sir.

Q. 67. And that is because it has more draft?

A. Yes, sir; in the right place.

Q. 68. Why do you have this band around back of the tubes?

A. That is to hold the tubes together.

Q. 69. And if you took the band off there would be more draft, wouldn't there?

A. Yes, sir; but not in the right place.

Q. 70. You don't want the draft on the inside, then?

A. You want it in the right proportion.

Q. 71. Then in this Boesch burner, as it is, the draft is in the right proportion, is it?

A. Yes, sir.

Q. 72. Then, of course, according to your theory, the Miller burner would not be as good as the Boesch burner, because it has not got as much draft?

A. As it is, no.

Q. 73. Well, how would it be if it was made exactly like the Boesch burner, except in regard to the cap?

A. If I make it exactly the same in every way it is the same thing.

Q. 74. If you make the Miller burner the same way, except in regard to the cap, it would not be as good as the Boesch burner without the cap, would it?

A. If I make it just like the Boesch burner it would be as good.

52 Q. 75. You understand the English language, don't you?

A. Yes, sir.

Q. 76. Now, just put your thoughts together and see if you can't understand this question. If you had the cap off the Miller burner, which was constructed just like the Boesch burner in other respects, it would be as good as the Boesch burner, wouldn't it?

A. Well, it might spoil it to take the cap off, and I might have to alter the contrivance.

Q. 77. Then it would not be as good as the Boesch burner?

A. No, sir; it is not as good as the Boesch burner.

Q. 78. And the reason is that there is not enough draft there?

A. There might be enough, but not around the wick; it depends; there is a contrivance put inside the burner to regulate the draft.

Q. 79. If you were to put on the Boesch burner a cap exactly like the Miller cap would the burner as then constructed be better or not so good as the burner as it is now constructed without a cap?

A. Not so good.

Q. 80. Why not?

A. Because the draft is more properly supplied now than it would be with a cap on it.

Q. 81. It would be on account of not having as much draft as the Boesch burner now has?

A. The amount of the draft depends on the contrivance.

Q. 82. Then suppose instead of being a Miller cap on the Boesch burner you were to take and put a Graff cap on it, how would it be?

A. It would be still worse; the more cap you put on the more spoilt it will be unless you change the contrivance.

(By Mr. BOONE:)

Q. 83. Are either of these burners complete, ready to be used, or is there something wanting?

A. No, sir; they would smoke like a smoke-stack.

Q. 84. What device do you use to give draft and still prevent smoking?

A. There are perforated cylinders used inside of the burners of different sizes.

Q. 85. Will you bring with you the next time you come here a complete contrivance arranged for your Boesch burner when in operation?

A. Yes, sir.

53 (By the MASTER:)

Q. 86. What was the selling price of the "Diamond" one-wick burner?

A. It is a very cheap burner; we sell them for about fifty cents apiece.

(Examination continued, in conformity with agreement of counsel, until Friday, the 25th instant, at two o'clock p. m.)

FRIDAY, *November 25th*, 1887.

Present: Mr. Miller, of counsel for complainant; Mr. Graff, complainant.

Counsel for respondent not attending, the hearing is further continued, at the request of complainant's counsel, to December 2nd, 1887, at two o'clock p. m.

FRIDAY, *December 2nd*, 1887.

Further continued, in conformity with agreement of counsel, to Thursday, December 8th, 1887.

THURSDAY, *December 8th*, 1887.

Present: Mr. Miller, of counsel for complainant; Mr. Boone, of counsel for respondents.

Examination-in-chief of ALBERT GRAFF on behalf of complainant (by Mr. MILLER):

Q. 1. When did you commence to sell these patented "Diamond" burners?

A. I received the first lot shortly after the Mechanics' Fair commenced in 1883; that was in August or September.

54 Q. 2. And have you been selling burners ever since?

A. Yes, sir.

Q. 3. Whereabouts?

A. In San Francisco.

Q. 4. You have a store here?

A. Yes, sir.

Q. 5. Where is your store?

A. 47 Second street.

Q. 6. And what do you sell in that store?

A. Lamps and coal-oil burners.

Q. 7. Have you sold any considerable number of these burners since that time?

A. Yes, sir; about ten to twelve thousand.

Q. 8. And you are still engaged in selling them?

A. Yes, sir; I sell them still.

Q. 9. How many sizes of those burners are there?

A. Four sizes—ten-wick burners, twelve-wick burners, sixteen-wick burners, and twenty-wick burners.

Q. 10. Do you manufacture these burners yourself?

A. No; only the fixtures.

Q. 11. Where do you get the burners from?

A. From Germany.

Q 12. From whom in Germany?

A. Schwintzer and Graff, in Berlin.

Q. 13. Then you import the burners from Germany and sell them here?

A. Yes, sir.

Q. 14. Have you at any time since becoming the owner of this patent granted to any other person or any other firm the right to sell these burners?

A. No, except to agents who took them from me.

Q. 15. That is, you have endeavored to keep the patent to yourself?

A. Yes, sir.

Q. 16. Do you understand what is meant by giving a person a license to operate under a patent?

A. I never gave any license, except that I have established agencies in the country to sell my burners, but I have never given them any licenses.

Q. 17. Can you tell us what has been the cost to you of those burners you get from Germany?

A. The ten-wick burner laid down here costs me one mark in Germany, and, of course, the cost of importation is about one
55 hundred per cent. One mark is twenty-five cents. The twelve-wick burner costs me thirty-two cents in Germany, and the cost of importation makes their net cost to me, laid down here, about sixty-five cents. The sixteen-wick burners cost me two marks in Germany, and laid down here cost me about one dollar. The twenty-wick burners cost me three marks in Germany, and cost me laid down here about a dollar and a half each.

Q. 18. Did you establish the price of these burners when you commenced selling them?

A. Yes, sir.

Q. 19. How long did you continue selling them at that price?

A. Until the spring of 1886.

Q. 20. What was your list of prices up to that time?

A. The twenty-wick burner we sold at retail at six dollars; the sixteen-wick burner at four dollars; the twelve-wick burners at three dollars, and the ten-wick burner at two dollars each.

Q. 21. Did you sell any considerable number of burners at those figures?

A. Yes, sir; we sold about six to seven thousand at those figures.

Q. 22. Did you afterwards at any time reduce your price?

A. Yes, sir; the 1st of March, 1886. I sent circulars out before that time, in which I stated that on the 1st of March that I would reduce the price.

Q. 23. To what did you reduce the prices on the various sizes?

A. We sold ten-wick burners at a dollar and a half; twelve-wick burners at two dollars and a half; the sixteen-wick burners at three dollars and a half, and the twenty-wick burners at five dollars. Those were the retail prices.

Q. 24. What were your wholesale prices at first? Look at the circular which I show you and tell me what that is.

A. This is a circular which was sent around by me into the country the 1st of March, 1886.

Q. 25. What was the purpose of the circular?

A. To show that we reduced the prices.

Q. 26. To whom do you refer by "we?"

A. To myself.

Q. 27. Does the circular show the prices to which you had reduced the burners?

A. Yes, sir.

56 Q. 28. Is there any other writing on that circular to show anything else?

A. Yes, sir; in my shop I made a new kind of lamp, and that is offered to the market in the circular.

(The circular above referred to is introduced in evidence by complainant for the purpose of showing the prices to which the burners were reduced after the 1st of March, 1886, marked "Complainant's Exhibit Circular.")

Q. 29. Does the circular show the wholesale or the retail prices?

A. The wholesale prices.

Q. 30. Is that your handwriting on the margin of the circular?

A. Yes, sir.

Q. 31. What do the figures written there show?

A. That shows our wholesale prices previous to that reduction.

Q. 32. What were those prices?

A. The ten-wick burners were fifteen dollars per dozen, the twelve-wick burners were twenty-four dollars per dozen, the sixteen-wick burners were thirty-six dollars per dozen, and the twenty-wick burners were forty-eight dollars per dozen.

Q. 33. What were the prices to which you reduced them?

A. The ten-wick burners were reduced to twelve dollars per dozen, the twelve-wick burners to eighteen dollars per dozen, the sixteen-wick burners to twenty-seven dollars per dozen, and the twenty-wick burners to thirty-nine dollars per dozen.

Q. 34. Why did you reduce your prices at that time?

A. At this time we reduced the prices on account of the infringement of this burner, which caused me to reduce the prices.

Q. 35. Infringement by whom?

A. By Mr. Boesch.

Q. 36. He had been infringing prior to that time, then?

A. Yes, sir.

Q. 37. Are you familiar with the lamp and burner trade in San Francisco?

A. Yes, sir.

Q. 38. Did persons wanting to purchase a burner ever come to your store and tell you that they could get it cheaper at any other place than you were selling them at?

57 A. Oh, yes; every day they came in and went right around the corner and bought them there.

Q. 39. Who is right around the corner?

A. Mr. Boesch, on Mission street.

Q. 40. His store was right around the corner from you?

A. Yes, sir.

Q. 41. What would those people say when they came into your place for burners?

A. First, they asked me for prices of the burners. Sometimes they bought their goods from me. Then they would go around the corner and come back or send back and countermand their order for the goods.

Q. 42. When you would tell them the prices of these burners what would they say?

A. If they had been already in Mr. Boesch's place they would say they could get them there.

Q. 43. Did any of them ever tell you that they could get them cheaper at Mr. Boesch's place?

A. Yes, sir.

Q. 44. Did they tell you at what prices they could get them there?

A. Sometimes they told me and sometimes not. It was through this that I first reduced the prices.

Q. 45. Did that thing occur frequently?

A. Yes, sir.

Q. 46. And after that it was, as I understand you, that you reduced your prices?

A. Yes, sir.

Q. 47. Do you know how many burners you have sold since you reduced your prices?

A. I have only the amount of burners we sold at wholesale. I have that in the book. Of those I can give the account. If somebody came in and bought a burner and paid for it I put the money in my book, but I didn't put any entry into the book.

Q. 48. You kept your wholesale sales in your book?

A. Yes, sir.

Q. 49. And didn't keep your retail sales?

A. When I sold them for cash and delivered them in the store at retail I put the money in my book and made no entry in the book. Sometimes when I sold them at wholesale for cash I made no entry. Whenever I sold them to be sent away, then I put them on my delivery book.

58 Q. 50. Have you got your books here which show an account of these last-mentioned sales—that is, where you sold them for credit?

A. Yes, sir.

Q. 51. You kept entries of those sales in your books?

A. Yes, sir.

Q. 52. Who kept those books?

A. My wife kept the books.

Q. 53. Have you any way of telling the number of burners that you have sold for cash, at retail, in your store since you reduced your prices?

A. No. Sometimes I sold twenty, sometimes three or four or five, a day. The average would be perhaps five or six a day.

Q. 54. How high have your sales run in that way at any time—that is, what is the highest number you have ever sold in one day at retail?

A. Say fifteen.

Q. 55. And what is the least number you have sold in a day?

A. Perhaps four burners.

Q. 56. Do you always sell some burners every day?

A. Yes, sir.

Q. 57. Is there ever a day in which your store has been open in which you didn't sell any burners at all?

A. I sold every day the burners.

Q. 58. And you say the average number of these burners that you would sell per day would be five or six?

A. Yes, sir.

Q. 59. Have you any way of ascertaining how many of those burners you have on hand now?

A. Yes, sir. I haven't a large stock on hand now. I can count how many I have on hand.

Q. 60. Have you any way of ascertaining how many burners you have imported here since the first of March, 1886?

A. Yes, sir.

Q. 61. Have you got a statement now showing how many burners you have received from Schwintzer & Graff?

A. Yes, sir.

Q. 62. What is the paper I now show you?

A. That is a statement of all burners I have received from Schwintzer & Graff from December 8th, 1883, up to the present time. Where in this statement appears "10'''" that refers to ten-wick burners; where there appears "14'''" that refers to
59 twelve-wick burners; "18'''" refers to sixteen-wick burners, and "30'''" refers to twenty-wick burners.

(The statement above referred to is introduced in evidence by complainant and marked "Complainant's Exhibit Importer's Statement.")

(By Mr. BOONE:)

Q. 63. Where did you get this statement?

A. It was sent to me by Schwintzer & Graff from Germany.

Q. 64. Did you send for this list?

A. Yes, sir.

Q. 65. Have you compared it with your shipping bills of lading that you have received?

A. Yes, sir; that is all correct.

Q. 66. Have you compared each of those items with your bills of lading?

A. Yes, sir.

Q. 67. When did you do that?

A. At the time I received this statement.

Q. 68. At the time you received the statement you compared it with your invoices, did you?

A. Yes, sir.

Q. 69. Have you those bills of lading now?

A. No; not all.

Q. 70. How many have you?

A. Two or three.

Q. 71. That is, you have only compared two or three bills of lading with this statement?

A. That is all.

Q. 72. Do you know of your own knowledge that each of these items in this statement is correct?

A. Yes, sir; that I know exactly.

Q. 73. You say you haven't got the bills of lading showing each of the items?

A. No.

Q. 74. What means have you of knowing that this statement is entirely correct, then? What means of knowledge have you by which you know positively that each of these items is correct?

A. By memory, and then from these statements that I have I know that portion of it is correct.

Q. 75. Have you those items you refer to?

A. Bills of lading, I mean.

Q. 76. As to the items of which you have no bills of lading, what means have you of knowing whether or not this statement is correct?

A. From my memory.

60 (Respondents object to the admission in evidence of "Exhibit Importer's Statement" on the ground that it is incompetent and irrelevant; objection overruled; respondents except.)

(By Mr. MILLER:)

Q. 77. What, in your judgment, is the feature in this patented burner which you consider makes it better than any other burner, if it is any better?

A. It is the cap at the top.

Q. 78. Is that cap any advantage to a burner?

A. It is a great advantage.

Q. 79. What advantage is it to the burner?

A. It gives a better, whiter flame, and it keeps it clean; without it it wouldn't burn.

Q. 80. Suppose you were to take the cap off of your burner and leave nothing except the round ends of the tubes around the top so that it became like the burner "Exhibit Boesch Burner," what would be the effect on the efficiency of the burner?

(Objected to by respondent and withdrawn.)

Cross-examination of ALBERT GRAFF (by Mr. BOONE):

Q. 1. How long do you say you have been importing and selling these burners?

A. Since the latter part of 1883.

Q. 2. And you say that from 1883 up to March 1st, 1886, you had a fixed schedule of prices?

A. Yes, sir.

Q. 3. You stated that on the first of March you changed your prices, reduced them?

A. Yes, sir.

Q. 4. Both wholesale and retail?

A. Both wholesale and retail.

Q. 5. Did you sell any more lamps after you reduced the prices than you did before?

61 A. No; Mr. Boesch sold them still cheaper than mine.

Q. 6. What effect did this reduction of prices have on your business; did it sell any more lamps for you?

A. No.

Q. 7. How about the cost of these lamps? Has the cost been the same to you during all this period of time?

A. The cost has been the same. It may have changed a trifle. I pay the same to Schwintzer & Graff for burners now that I did in 1883.

Q. 8. Who got up the circular "Exhibit Circular?"

A. I got it up.

Q. 9. You circulated this circular among your customers throughout the country, did you?

A. Yes, sir.

Q. 10. Is this circular true, as a matter of fact? Does it state the truth?

A. Yes, sir.

Examination-in-chief of ANTOINETTE GRAFF on behalf of complainant (by Mr. MILLER):

Q. 1. You are the wife of Albert Graff, the complainant?

A. Yes, sir.

Q. 2. Do you have anything practically to do with his business?

A. I am always in the store.

Q. 3. What do you do?

A. Attend to customers; keep the store.

Q. 4. Who keeps the books that are kept?

A. Myself.

Q. 5. How long have you been keeping those books?

A. Ever since we opened the store.

Q. 6. What kind of books do you keep?

A. I have got them here. It is not regular book-keeping because I don't understand it; but when I get orders I write them in the books, and then send people bills, and when they pay me I give them credit.

Q. 7. Do you put down in the books all the burners that you sell?

A. Not those that are sold for cash.

Q. 8. What sales do you enter?

62 A. Those sent to the country—the orders from the country.

Q. 9. What class of burners is it that you don't put down on your books?

A. Those sold to private people who come into the store and buy burners for cash.

Q. 10. Have you prepared any statement from your books showing the number of burners you have sold?

A. Yes, sir; I put all the burners together and put on a separate page so many of each size.

Q. 11. Have you that statement here?

A. Yes, sir.

Q. 12. Can you tell from that statement how many burners were sold and the amount of which appears upon your books since March, 1886?

A. I can do that better from my book than from a statement. That statement shows how many we had altogether—how many we received for the whole time from 1883 until now.

Q. 13. Does it show the different sales of burners, too?

A. Yes, sir; and the different prices of burners.

Q. 14. Can you refer to your books and tell us, so far as appears from the books, how many of those burners you have sold since March, 1886, the time when you reduced your prices?

A. Yes, sir; I have in this book in my own hand a record of sales from March 1st to October 30th.

Q. 15. Does that represent all the sales which you made during that time?

A. All the credit sales.

Q. 16. It does not represent the cash sales?

A. No.

Q. 17. From that statement how many burners were sold?

A. Of the ten-wick burners, thirteen hundred and twelve; of the twelve-wick burners, four hundred and fifty; of the sixteen-wick burners, five hundred and ninety-two; of the twenty-wick burners, seven hundred and sixteen.

Q. 18. That represents the credit sales during that time, I understand?

A. Yes, sir.

Q. 19. Did you make any cash sales during that time?

A. Yes, sir; but I haven't put them down in the book.

Q. 20. Have you any way of judging as to the number of your cash sales during that time?

A. No, sir; I cannot tell.

63 Q. 21. Did you make cash sales of those burners every day?

A. Yes, sir.

Q. 22. Could you tell about how many burners those sales would average per day during that period from March 1st up to the 30th of October?

A. I reckon about five or six burners a day.

Q. 23. At what price did you make these credit sales?

A. The twenty-wick burners were sold at thirty-nine dollars a dozen, the sixteen-wick burners at twenty-nine dollars per dozen, the twelve-wick burners at eighteen dollars per dozen, and the ten-wick burners at twelve dollars per dozen.

Q. 24. Were those your wholesale or retail prices?

A. Wholesale prices.

Q. 25. Do you know why those prices were reduced?

A. Yes, sir.

Q. 26. Why?

A. We were compelled to do so.

Q. 27. For what reason?

A. Our customers from the country would say, "How is it that you sell burners so much higher than Mr. Boesch does?" We said, "Well, we couldn't sell them any cheaper," and they said they couldn't buy them from us.

Q. 28. Did you receive letters from customers saying that?

A. No sir; they came personally into the store and told us that.

Q. 29. Did more than one person come?

A. Yes, sir.

Q. 30. Can you tell how many persons came and made that statement to you?

A. No; I couldn't tell the number, but I heard it every day.

Q. 31. And you say that was the reason you reduced the prices?

A. Yes, sir.

(Continued, in conformity with agreement of counsel, to December 9th, 1887, at two o'clock p. m.)

FRIDAY, *December 9th*, 1887.

Present: Mr. Miller, of counsel for complainant; Mr. Boone, of counsel for respondents; Mr. Boesch, respondent.

The complainant Graff not appearing, the hearing is further continued, in conformity with agreement of counsel, to December 13th, 1887, at two o'clock p. m.

64 TUESDAY, *December 13th*, 1887.

Present: Mr. Miller, of counsel for complainant; Mr. Boone, of counsel for respondents; Mr. Graff, complainant; Mr. Boesch, respondent.

Respondent admits that all times since the time when respondent commenced infringing upon complainant's rights under his patent complainant has been able to and in condition to supply the trade with burners, including the patented invention.

(Continued, in conformity with agreement of counsel, to December 14th, 1887, at half past ten o'clock a. m.)

(Complainant rests.)

WEDNESDAY, *December 14th*, 1887.

Present: Mr. Miller, of counsel for complainant; Mr. Boone, of counsel for respondents; Mr. Graff, complainant; Mr. Boesch, respondent.

Examination-in-chief of EMIL BOESCH on behalf of respondents (by Mr. BOONE):

Q. 1. You keep books in your business, do you?

A. Yes, sir.

Q. 2. Do you enter upon your books the sales of burners that you sell?

A. Yes, sir.

Q. 3. Do your books show all the sales made, wholesale and retail?

A. Yes, sir.

Q. 4. Do your books show the number of "Mitrailleuse" burners having a cap which you sold?

A. Yes, sir.

Q. 5. When you sell a "Mitrailleuse" burner or a multiple-
65 wick burner do you enter what particular style it is that you sell; whether it has a cap or no cap?

A. No, sir.

Q. 6. Is there anything in your books to distinguish what particular construction in that respect the burners sold by you have?

A. No, sir.

Q. 7. What means have you of determining the number of "Mitrailleuse" burners sold by you which have full cap?

A. The means that I related the other day; that when we had received the notice we had sold so many. Then we stopped selling them that way. Then a few we sold when you told us to go ahead, after the other suit was commenced. Then when this suit was brought we stopped again.

Q. 8. Can you state positively from your own knowledge the number of "Mitrailleuse" burners with a full cap, similar to the one described in the complainant's patent, your firm has sold at any time up to the present date?

A. No, sir.

Cross-examination of EMIL BOESCH (by Mr. MILLER):

Q. 1. What books do you keep in which you enter those sales?

A. What we call our cash book and day books.

Q. 2. Who keeps the books?

A. There is a book-keeper.

Q. 3. What is his name?

A. Artiques.

Q. 4. As the sales are made they are turned in to him and he enters them in the book?

A. Yes, sir.

Q. 5. Were any of those sales made while you were away in Europe?

A. Yes, sir.

Q. 6. How do you come here, then, and testify positively that only such a number of sales were made if they were made while you were in Europe?

A. Because I looked over the books.

Q. 7. Then the testimony that you have given was taken from the books?

A. From the books and conversations with Mr. Bauer and the salesman.

Q. 8. They told you how many sales had been made?

A. Yes, sir; the best proof I had was there was a certain number of burners I had imported, and then there was what we had left and what we had ordered.

66 Q. 9. You never received but two invoices of those goods?
A. Only two.
Q. 10. The second invoice was received, I believe, after this suit was commenced?
A. Yes, sir; but they were ordered before I left, and Mr. Boone told us to go on and sell them as we had before.
Q. 11. There were two suits against you, were there not?
A. Yes, sir.
Q. 12. And do you remember when the first suit was commenced?
A. I could find out, if it was important.
Q. 13. The first suit was commenced after you went to Europe and was dismissed?
A. Yes, sir.
Q. 14. And after that suit was dismissed this present suit was commenced?
A. Yes, sir.
Q. 15. While you were in Europe did you not know of the pendency of this present case—didn't Mr. Bauer write to you about it?
A. Yes, sir.
Q. 16. Didn't you get the affidavits of certain people in Europe?
A. No, sir; the affidavits have been gotten since I got back.
Q. 17. Some affidavits were introduced in this case taken in Europe. Who attended to that?
A. I didn't attend to them. I understand that Mr. Boone did.
Q. 18. Do you know Hugo Keppen or Robert Keppen, in Berlin?
A. By name.
Q. 19. Not personally?
A. No, sir.
Q. 20. Did you call on him while you were there?
A. No, sir; I didn't go to Berlin at all.
Q. 21. From whom did you get these burners in Germany; was it from Hecht?
A. The first lot was from Carlo Holy, in Berlin, and the second lot was from Hecht.
Q. 22. And you are certain that those two lots are the only ones that you ordered?
A. Yes, sir.
Q. 23. Did Mr. Bauer write to you about this suit while you were in Europe?
A. Yes, sir.
67 Q. 24. And he told you that it was pending?
A. Yes, sir.
Q. 25. So that while you were there you knew that it was pending?
A. Yes, sir; and I wished them to keep it back until I returned.
Q. 26. Were the burners in the first invoice which you got all of them with caps when they first came?
A. No, sir.
Q. 27. How many of them had caps?
A. Fifty had caps like "Exhibit C."

Q. 28. What did the others have on top of the wick tubes?
A. The same as "Exhibit 12-Wick Burner."
Q. 29. The second invoice which you got included one hundred twenty-wick burners and one hundred sixteen-wick burners. Did they have caps on them when they came here?
A. Yes, sir; like "Exhibit C."

Re-examination (by Mr. BOONE):

Q. 1. Did you ever sell any burners with a cap like "Complainant's Exhibit B?"
A. No, sir.
Q. 2. Did you ever have any in your shop?
A. I had twelve.
Q. 3. What did you do with them?
A. I returned them to the party from whom I bought them.
Q. 4. And you say you sold how many like "Exhibit C?"
A. Fourteen, of different sizes.
Q. 5. All the others that you sold were like "Exhibit Boesch Burner" and "Exhibit Miller Burner?"
A. Yes, sir.
Q. 6. State what size those fourteen were that you sold.
A. Eight twenty-wick and six sixteen-wick.
Q. 7. Were the sales of these fourteen burners before or after you went to Europe?
A. Four were made before and ten after.

(Respondents rest.)

68 Re-examination of ALBERT GRAFF on behalf of complainant (by Mr. MILLER):

Q. 1. Have you prepared an account of the number of burners of the kind described in the patent that you have on hand now?
A. Yes, sir; I have on hand December 14th, 1887, four hundred and ninety-one ten-wick burners, two hundred and sixty-seven twelve-wick burners, three hundred and sixty-four sixteen-wick burners, and one hundred and sixty-nine twenty-wick burners.

It is agreed that Mr. Miller, of counsel for complainant, shall visit the place of business of respondents and examine their books of account, and that, should he so desire after such examination, the books shall be produced before the master, or the witnesses may be recalled for further examination.

It is also agreed that in case the master should require further testimony he shall be at liberty to recall any or all of the witnesses for further examination.

68*a* U. S. C't Ct., N. Dist. Cal.

GRAFF
v.
BOESCH. } Reference. Accounting.

COMPLAINANT'S EXHIBIT EXPORTER'S STATEMENT. S. C. H., Master.

BERLIN, *den 2ten November*, 1887.

Zinkgiesserei, Lampen- und Bronce-Waaren-Fabrick Berlins, Sebastian-Strasse 18, *von Schwintzer & Græff, Factura für Herr Albert Græff, San Francisco, sandten Ihnen auf Ihre Ordere Rechnung und Gefahr.*

S. &. G.

1883.									
Decemb.	8.	102	St.	10···	Diamt.-Brenner,	Brandsch. Amerik. Gew'de		.93	94.86
		50	"	14···	"	"	@	1.30	65
		60	"	18···	"	"		2.00	120
		6	"	30···	"	"		3.25	19.50
1884.									
Januar	26.	100	"	18···	"	"		2.00	200
		200	"	14···	"	"		1.30	260
März	18.	100	"	18···	"	"	of varig.	T.	194
		100	"	10···	"	"	"	T.	100
		100	"	14···	"	"	"	T.	130
März	31.	100	"	14···	"	"	"	T.	130
		100	"	18···	"	"	"	T.	200
		96	"	10···	"	"	"	1.00	96
		12	"	30···	"	"	"	3.25	39
		100	"	10···	"	"	"	P	100
Juni	5.	400	"	10···	"	"	"	1.00	400
		396	"	10···	"	"	"	"	396
Juli	15.	192	"	10···	"	"	"	"	192
		125	"	14···	"	"	"	1.30	162.50
		25	"	18···	"	"	"	2.00	50
		20	"	30···	"	"	"	3.25	65
1885.									
Februar	26.	"	"	14···	Diamantbrenner,	@ Rand		1.30	5.20
		96	"	14···	"			1.30	124.80
		301	"	10···	"			1.00	301
		110	"	18···	"			2.00	220
		100	"	30···	"			T.	325
März	16.	90	"	18···	"			2.00	180
"	"	200	"	10···	"			2.10	420
		100	"	30···	"			T.	325
		500	"	10···	"	@ Varrg.		1.00	500
		100	"	14···	"	m. "		T.	130
Novbr.	9.	31	"	30···	"			3.00	93
		20	"	30···	"	tomb.		3.45	69
		54	"	10···	"	vernick. @ Varrg.		1.20	64.80
		54	"	10···	do.	tomb.		1.20	64.80
		24	"	14···	"	tomb.		1.55	37.20

1884.									
October	16.	30	"	30···	Diamantbrenner, Brenner			3.25	97.50
		50	"	10···	"	"	@ Varrg.	1.00	50
		50	"	18···	"	"		1.00	50
		50	"	18···	"	"		2.00	100
		30	"	14···	"	"		1.30	39
Decemb.	6.	42	"	14···	"	7¼ Rfn.	@ Varrg.	1.50	63
		6	"	14···	"	9 "	@ "	1.65	9.90
		32	"	18···	"	9 "	@ "	2.30	73.60
		11	"	14···	"	m. Kglod,	@ "	1.34	14.74
		10	"	14···	"	@ Rd.,	@ "	1.25	12.50
		50	"	18	"	m. Varrg.		2.00	100
		50	"	30···	"			3.25	162.50
		151	"	10···	"		@	1.00	151
		100	"	14	"	m. Varrg.		T.	130
1885.									
Januar	31.	299	"	10···	"	@ "		1.00	299
		120	"	14···	"	m. "		1.30	156
		48	"	30···	"	"		3.25	156
		40	"	30···	"			"	130
		196	"	18···	"			2.00	392
		1	"	18···	m. Hakenverschluss				2.10
Mai	27.	8	"	30···	Dt.-Br., m. Varrg.			3.25	26
		12	"	18···	"	"		2.—	24
		18	"	14···	"	"		1.30	23.40
		24	"	10···	"	@ "		1.—	24
		1	"	14···	"	m. "	nickel	T.	1.55
		12	"	10···	"	@ "	"	1.20	14.40
		12	"	14···	"	m. "	"	1.55	18.60
		3	"	18···	"	m. "	"	2.30	6.90
		12	"	10···	"	@ tomb.		1.25	15
		12	"	14···	"	m. "		1.55	18.60
		16	"	18···	"	"		2.30	36.80
		72	"	10···	"	@ "		1.00	72
Decemb.	31.	150	"	30···	"	"		3.00	450
		50	"	14···	"	nickel		1.55	77.50
		50	"	10···	"	@ Varrg.		1.00	50
685		12	"	Diamt.-Brenner		18···	nickel	2.30	27.60
		17	"	"		10···	tomb. @ Varrg.	1.20	20.40
		24	"	Untertheile		18···		1.30	31.20
		12	"	"		30···		2.00	24
1886.									
August	23.	260	"	Diamt.-Br.		30···	Untertheile	3.00	780
		140	"	"		30···	"	"	420
		100	"	"	nickel	30···		3.28	328
		202	"	"		14···	nickel	1.20	242.40
		202	"	"		10···	nickel @ Varrg.	1.16	232
		350	"	"		10···	Messg. @ "	.96	336
		350	"	"		10···	Varrg.	.96	432
		100	"	"		14···	m. " nickel	T.	140
		50	"	"		18··	m. "	1.85	92.50
1885.									
December	11.	203	"	"		10···	@ "	1.00	203
		124	"	"		10···	@ " tomb.	1.20	148.80
		141	"	"		10···	@ " nickle	"	169.20
		102	"	"		14···		1.30	132.60
		58	"	"		14···	tomb.	1.55	89.90
		18	"	"		14···	"	"	27.90
		295	"	"		18···	"	2.00	590
		100	"	"		18···	"		230
		60	"	"		30···		3.00	180

1887.								
Septbr.	17.	300	"	Diamt.-Br.	30···	----------	3.00	900
		88	"	"	30···	----------	"	264
		100	"	"	14···	tomb. ----------	----	135
		288	"	"	14···	Messg.----------	1.15	331.20
		765	"	"	10···	@ Varrg.--- ----------	.92	703.80
		100	"	"	18···	" ----------	T.	185
		221	"	"	10···	" ----------	.92	203.32
		23	"	"	18···	" ----------	1.85	42.55
		125	"	"	18···	" ----------	"	231.25
		55	"	"	18···	" ----------	"	101.75
		8	"	"	14···	" ----------	1.15	9.20
		13	"	"	13···	" ----------	.96	12.48

69 COMPLAINANT'S EXHIBIT CIRCULAR. S. C. H., Master.

U. S. Circuit Court, N. Dist. Cal.

GRAFF *v.* BOESCH. } Reference. Accounting.

A. S. Graff & Co., importers and wholesale dealers in lamps and patentees of the Diamond coal-oil burner, 47 Second street, San Francisco.

SAN FRANCISCO, *M'ch 1st*, 1886.

Charles Schwartz, Marysville.

DEAR SIR: We wish to place before you this reduced price-list of Graff's patent Diamond burner.

Since the time that this burner was placed on the market it has met with such approval and has convinced everybody of its merits that we feel confident that with our reduction in prices it will be the leading coal-oil burner throughout the States.

Former prices.		Per doz.		Per doz.
15 00	10-wick burners ----	$12 00	Chimneys for 10-wick burners----	$1 75
24 00	12 " " ----	18 00	" " 12 " " ----	2 00
36 00	16 " " ----	27 00	" " 16 " " ----	2 50
48 00	20 " " ----	39 00	" " 20 " " ----	4 00

These reduced prices are for cash only. A full assortment of founts, harps, and hanging table lamps always on hand, and we call your special attention to our own manufactured "common-sense stand lamp."

As there will be a large demand with these low prices, we would advise you to place your orders as early as possible and oblige,

Yours truly, A. S. GRAFF & CO.

70 COMPLAINANT'S EXHIBIT DEFENDANT'S BILL. S. C. H., Master.

U. S. Circuit Court, N. Dist. Cal.

GRAFF
v.
BOESCH. } Reference. Accounting.

Pacific Lamp and Reflector Factory.

Patent locomotive headlights, mill and mining lamps, ornamental globe and plain street lamps.
Ship, railroad, car, coach and every other style of lamps and reflectors.

Payable in U. S. gold coin.

Opal and silver-plated corrugated glass reflectors; successor to Robert Mills' Ornamental Lamp Factory; plumbers' copper ware and general metal spinning and stamping.

SAN FRANCISCO, *Feb'y* 28, 1886.

Alta Pub. Co. to Emile Boesch, Dr., 583 & 585 Mission street, just below Second.

Architectural ornaments of pressed and cast zinc.

Jan.	9.	1 8 x 12 lantern, set up	3 25	
	21.	1 6 x 10 "	2	
Feb'y	4.	1 brass lamp	3	
		1 shade & bracket	1	
	11.	2 lamps, D. founts & Diamond burner (2.90)	5 80	
	15.	1 bracket lamp (B. burner, chim., & shade)	2	
		1 18" cor. tin shade	1	
		1 25" opal gl. reflector	12 50	
	17.	2 lamps, D. founts & Diamond bur.	5 80	
	24.	2 18" tin shades, 1	2	
		2 chimneys for Diamond burner	80	
				39 15
	26.	2 " " " "		80
				39 95

Paid May 1, '86.

71 COMPLAINANT'S EXHIBIT DEFENDANT'S BUSINESS CARD. S. C. H., Master.

U. S. Circuit C't, Cal.

GRAFF
v.
BOESCH } Reference. Accounting.

Pacific Lamp and Reflector Factory.

Emile Boesch, 583 and 585 Mission street, just below Second, San Francisco. Patent locomotive, mining, cable-car, railroad, ship, coach, and street lamps; opal and silver plated corrugated glass reflectors and sun lights for lighting and ventilating churches, halls, stores, etc.; Diamond coal-oil burners; square, round, and tubular lanterns. Gold, silver, and bronze medals awarded for best lamps and reflectors. Metal spinning and stamping.

(Endorsed:) Filed April 30th, 1888. L. S. B. Sawyer, clerk, by F. D. Monckton, deputy clerk.

72 *Exceptions to Master's Report.*

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

ALBERT GRAFF *et al.*, Complainants,
vs.
EMILE BOESCH *et al.*, Defendants.

Exceptions taken by the said respondents to the report of S. C. Houghton, Esq., the standing master in chancery of this honorable court to whom this cause stands referred, bearing date the 30th day of April, 1888.

First exception. For that the said master has in and by his said report certified on page six thereof that "the cap was the essential feature of the Graff burner. The respondent adopted Graff's arrangement, and then reduced the price of the burner, forcing Graff to do the same in order to hold his trade. The evidence shows that the reduction in prices by Graff was solely due to the respondents' infringement. So far as the evidence shows, the only competitor with Graff in the use of his cap arrangement during the period covered by the accounting was the respondent;" whereas the said master ought to have certified that respondent came innocently into possession of the burners by purchase in the ordinary course of business from legitimate manufacturers thereof in Germany, and that immediately upon being notified that they were claimed to be an infringement he ceased to sell the same. The evidence shows that at about the time Graff made the alleged reduction in the price of his burners there was thrown upon the market lamp burners of other kinds of equal or greater power, which came directly in com-

petition with the Graff burner, and that the reduction in price was the result of such competition; that the sale of 14 infringing burners by respondent in the course of three years' trade could not have been a sufficient competition to plaintiff's business to cause him to make a reduction of price, where the testimony shows
73 that during the period from March 1st, 1886, when complainant reduced the price of burners, until Oct. 31st, 1887, he sold about 6,000 of said burners.

Second exception. For that the said master hath certified "that the amount of damages which the complainant has suffered and sustained from and by reason of said infringement is two thousand nine hundred and seventy dollars and fifty cents;" whereas he should have reported nominal damages.

In all which particulars the report of the said master is, as the said respondent is advised, erroneous, and the said respondent appeals therefrom to the judgment of this honorable court.

May 24th, 1888.

SCRIVNER & BOONE,
Solicitors for Respondents.

(Endorsed:) Service and receipt of a copy of within exceptions admitted this 24th day of May, 1888. Langhorne & Miller, attorneys for compl. Filed May 25, 1888. L. S. B. Sawyer, clerk, by F. D. Monckton, deputy clerk.

74 At a stated term, to wit, the November term, A. D. 1888, of the circuit court of the United States of America of the ninth judicial circuit in and for the northern district of California, held at the court-room, in the city and county of San Francisco, on Monday, the 28th day of January, in the year of our Lord one thousand eight hundred and eighty-nine.

Present: The Honorable Lorenzo Sawyer, circuit judge.

Copy of Order Overruling Exceptions to Master's Report.

A. GRAFF
vs.
E. BOESCH *et al.* } No. 4107.

This cause, heretofore heard and submitted to the court for consideration and decision upon the exceptions to the master's report herein, having been duly considered, it is ordered that said exceptions be, and the same hereby are, overruled and a decree filed and entered herein for complainant and for costs.

75 *Enrollment.*

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

ALBERT GRAFF *et al.*, Complainants,
vs.
EMILE BOESCH, Respondent. } No. 4107.

The complainants filed their bill of complaint herein on the 17th day of September, 1886, which is hereto annexed.

A subpœna to appear and answer in said cause was thereupon issued, returnable on the first day of November, A. D. 1886, which is hereto annexed.

On the 19th day of October, 1886, an amended bill of complaint was filed herein, which is hereto annexed, and a subpœna to appear and answer said amended bill of complaint was thereupon issued, returnable on the sixth day of December, 1886; which subpœna is hereto annexed.

The respondents appeared herein on the 6th day of December, 1886, by Scrivner and Boone, Esqs., their solicitors.

An answer was filed herein on the 3rd day of January, 1887, and is hereto annexed.

A replication to said answer was filed herein on the 31st day of January, 1887, and is hereto annexed.

An interlocutory decree was filed and entered herein on 17th day of October, 1887, which is hereto annexed.

On the 30th day of April, 1888, a master's report was filed herein and is hereto annexed.

Exceptions to said master's report were filed herein on the 25th day of May, 1888, and are hereto annexed.

On the 28th day of January, 1889, an order overruling said exceptions was entered herein; a copy of which order is hereto annexed.

Thereafter a final decree was filed and entered herein in the words and figures following, to wit:

76 *Final Decree.*

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

ALBERT GRAFF and J. F. DONNELL, Complainants,
vs.
EMILE BOESCH and MARTIN BAUER, Respondents. } No. 4107.

At a stated term of the circuit court of the United States of America of the ninth judicial circuit in and for the northern district of California, held at the court-room thereof, in the city and county of San Francisco, on Monday, the 28th day of January, A. D. 1889.

Present: The Honorable Lorenzo Sawyer, circuit judge.

This cause having been heard by the court at the October term thereof, in the year 1888, on the pleadings and proofs, documentary and oral, taken and filed therein, and an interlocutory decree having been entered and filed in said cause on the 17th day of October, A. D. 1887, wherein it was ordered, adjudged, and decreed that the letters patent of the United States issued on the 4th day of December, 1883, to Carl Schwintzer and William Graff, of Berlin, Germany, assignors of one-half to J. F. Donnell & Company, of New York, numbered No. 289,571, entitled "A lamp burner," were good and valid in law; that the said Carl Schwintzer and William Graff were the original and first inventors of the invention therein

claimed; that the complainants herein were the sole and exclusive owners thereof, and that the said respondents, Emile Boesch
77 and Martin Bauer, had infringed upon the exclusive rights of the complainants under the same, and which said interlocutory decree further ordered that the matter be referred to S. C. Houghton, Esq., master in chancery in said court, to take, state, and report to this court an accounting of lamp burners sold by respondents containing the invention claimed in and by the first claim of said letters patent, and also the gains, profits, and advantages which the said respondents have made and received or which have arisen or accrued to them since the 4th day of December, 1883, from and by infringing the said first claim of said letters patent, as well also the amount of damages which the complainants have sustained by reason of any infringement by said respondents of the first claim of said patent since said 4th day of December, 1883.

And the said master having filed his report in pursuance of the order contained *contained* in said decree assessing and fixing the said damages sustained by complainants at the sum of $2,970.50, and the court having this day confirmed said report and ordered that a final decree be entered in accordance therewith for said sum, with costs.

And it further appearing that the complainants herein have waived all claims for any and all gains, profits, and advantages which respondents have received or have arisen or accrued to them from and by reason of said infringement:

Now, therefore, it is ordered, adjudged, and decreed that the said complainants, Albert Graff and J. F. Donnell, do have and recover from the said respondents, Emile Boesch and Martin Bauer, and that the said respondents do pay to the said complainants the said sum of $2,970.50, with interest thereon at the rate of seven per cent. per annum from the 30th day of April, 1888, the same being the day on which the master filed his said report, and for complainants' proper costs and disbursements in this cause, taxed at the sum of $212.60 (see cost bill on entry of interlocutory decree, and also one filed on entry of final decree).

LORENZO SAWYER,
Circuit Judge.

Dated February 13th, A. D. 1889.

(Endorsed:) Filed & entered Feb. 13, 1889. L. S. B. Sawyer, clerk.

78 *Memorandum of Costs, etc.*

UNITED STATES OF AMERICA:

Circuit Court of the United States, Ninth Circuit, Northern District of California.

A. S. GRAFF *et als.*, Plaintiffs, *vs.* EMILE BOESCH *et als.*, Defendants. } Memorandum of Costs and Disbursements.

Disbursements:

Marshal's fees, serving process	$2 00
Clerk's fees	17 75
" " issuing subpœna for def't Bauer	1 30

Marshal's fees, serving same on Bauer	$2 10
Counsel fee for examining & cross-examining eight witnesses whose depositions were offered and admitted in evidence (see names on back hereof), @ $2.50 each	20
Docket fees	20
Fees of examiner for taking testimony	55
Affidavit to bill — complaint	50
" " am'd "	50
" " cost bill	25
2.15 p. m., no one appearing to oppose same, taxed at	$119 40

L. S. B. SAWYER, *Clerk*,
By F. D. MONCKTON, *Dep'y Clk.*

UNITED STATES OF AMERICA,
Northern District of California, City and County of San Francisco, } *ss:*

79 J. H. Miller, being duly sworn, deposes and says that he is one of the attorneys for the complainant in the above-entitled cause, and as such is better informed relative to the above costs and disbursements than the said complainant.

That the items in the above memorandum contained are correct, to the best of this deponent's knowledge and belief, and that the said disbursements have been necessarily incurred in the said cause.

J. H. MILLER.

Subscribed and sworn to before me this 5 day of October, A. D. 1887.

F. D. MONCKTON,
Commissioner of U. S. Circuit Court,
Northern District of California.

To Scrivner & Boone, solicitors for def'ts:

You will please take notice that on Friday, the seventh day of October, A. D. 1887, at the hour of 2 o'clock p. m., we will apply to the clerk of said court to have the within memorandum of costs and disbursements taxed, pursuant to the rule of said court in such case made and provided.

LANGHORNE & MILLER,
Sol's for Complainants.

(Endorsed:) Service of within memorandum of costs and disbursements and receipt of a copy thereof acknowledged this 5th day of October, A. D. 1887. Scrivner & Boone, sol's for respondents. Filed this 5th day of October, A. D. 1887. L. S. B. Sawyer, clerk, by F. D. Monckton, deputy clerk.

Witnesses: A. W. Stott, W. F. Stevens, Geo. F. Stule, B. F. Tower, A. S. Graff (exam.-in-chief); Martin Bauer (called for pl'ff); A. Graff (called for def't); Martin Bauer (called for def't).

80 UNITED STATES OF AMERICA:

Circuit Court of the United States, Ninth Circuit, Northern District of California.

A. GRAFF *et al.*, Plaintiffs, vs. E. BOESCH *et al.*, Defendants. } Memorandum of Costs and Disbursements.

Disbursements:

Master's fees p'd on accounting	$74 00	
Cost bill already filed on October 7, 1887	119 50	
	$193 50	
Oath to cost bill	25	
	$193 75	
	119 50	Already taxed and docketed.
Taxed at	$74 25	

L. S. B. SAWYER, *Clerk*,
By F. D. MONCKTON,
Deputy Clerk.

UNITED STATES OF AMERICA,
Northern District of California, City and County of San Francisco, } *ss:*

J. H. Miller, being duly sworn, deposes and says that he is the attorney for the complainant in the above-entitled cause, and as such is better informed relative to the above costs and disbursements than the said complainant; that the items in the above memorandum contained are correct, to the best of this deponent's knowledge and belief, and that the said disbursements have been necessarily incurred in the said cause.

81 J. H. MILLER.

Subscribed and sworn to before me this 5th day of May, A. D. 1888.

F. D. MONCKTON,
Commissioner of U. S. Circuit —, Northern District of California.

To Scrivner & Boone, sol's for respondent:

You will please take notice that on Tuesday, the 8th day of May, A. D. 1888, at the hour of ten o'clock a. m., we will apply to the clerk of said court to have the within memorandum of costs and disbursements taxed, pursuant to the rule of said court in such case made and provided.

LANGHORNE & MILLER,
Attorneys for Complainant.

(Endorsed:) Service of within memorandum of costs and disbursements and receipt of a copy thereof acknowledged this 5th day of

May, A. D. 1888. Scrivner & Boone, attorneys for respondent. Filed this 5th day of May, A. D. 1888. L. S. B. Sawyer, clerk, by F. D. Monckton, deputy clerk.

82 UNITED STATES OF AMERICA:

Circuit Court of the United States, Ninth Circuit, Northern District of California.

ALBERT GRAFF *et al.*, Plaintiffs, *vs.* EMILE BOESCH *et al.*, Defendants. } Memorandum of Costs and Disbursements; on Accounting.

Disbursements:

Clerk's fees	$8 70	
½ master's fees on acc't'g	74 00	Already taxed. See cost bill, May 5, '88.
Att'y's fees, taking four depositions, viz., Emile Boesch, Albert Graff, Antoinette Graff, and Emile Boesch, @ 2.50	10 00	
Affidavit of cost bill	25	
Taxed at	$92 95	

L. S. B. SAWYER, *Clerk*,
By F. D. MONCKTON, *Deputy Clerk*.

UNITED STATES OF AMERICA,
Northern District of California, City and County of San Francisco, } ss:

J. H. Miller, being duly sworn, deposes and says that he is one of the attorneys for the complainants in the above-entitled cause, and as such is better informed relative to the above costs and disbursements than the said complainants; that the items in the above memorandum contained are correct to the best of this deponent's knowledge and belief, and that the said disbursements have been necessarily incurred in the said cause.

J. H. MILLER.

Subscribed and sworn to before me this 29th day of Jan., A. D. 1889.

F. D. MONCKTON,
Commissioner U. S. Circuit Court,
Northern District of California.

83 To Mess. Scrivner & Boone, att'ys for def'ts:

You will please take notice that on Saturday, the 2nd day of February, A. D. 1889, at the hour of 10 o'clock a. m., we will apply to the clerk of said court to have the within memorandum of costs and disbursements taxed, pursuant to the rule of said court in such case made and provided.

LANGHORNE & MILLER,
Attorneys for Complainants.

(Endorsed:) Service of within memorandum of costs and disbursements and receipt of a copy thereof acknowledged this 30th day of January, A. D. 1889. Scrivner & Boone, attorneys for defendants. Filed this 30th day of January, A. D. 1889. L. S. B. Sawyer, clerk, by F. D. Monckton, deputy clerk.

Certificate to Enrolled Papers.

Whereupon said pleadings, subpœnas, master's report, exceptions, copy of order, decree, and three memorandums of taxed costs are hereto annexed, said final decree being duly signed, filed, and enrolled, pursuant to the practice of said circuit court.

Attest, etc.:

[SEAL.] L. S. B. SAWYER, *Clerk*,
By F. D. MONCKTON, *Deputy Clerk*.

(Endorsed:) Enrolled papers. Filed February 13th, 1889. L. S. B. Sawyer, clerk, by F. D. Monckton, deputy clerk.

84 *Caption.*

In the Circuit Court of the United States for the Ninth Judicial Circuit in and for the District of California.

ALBERT GRAFF, Complainant,
vs.
EMILE BOESCH *et al.*, Respondents. } In Equity. No. 4107.

Be it remembered that on the 8th day of March, A. D. 1887, and on the several days thereafter to which the examination was regularly adjourned, as hereinafter set forth, at my office, room 57, in the United States Appraisers' building, on the northeast corner of Washington and Sansome streets, in the city and county of San Francisco, State of California, before me, S. C. Houghton, examiner in chancery of the circuit court of the United States for the ninth circuit and district of California, personally appeared the several witnesses whose names are hereinafter set forth, who were produced and examined on behalf of the respective parties to the above-entitled cause.

John H. Miller, Esq., appeared as counsel on behalf of complainant, and John L. Boone, Esq., as counsel on behalf of respondent.

Following is a record of the proceedings:

85 TUESDAY, *March 8th*, 1887.

Present: Mr. Miller, of counsel for complainants; Mr. Boone, of counsel for respondents.

Complainants introduce in evidence certified copy of United States letters patent No. 289,571, granted December 4th, 1883, to Carl Schwintzer, Wilhelm Graff, and J. F. Donnell for improvement in lamp burners, marked "Complainants' Exhibit A."

Respondents admit that the title to all rights under the patent, "Exhibit A," are vested by *mesne* assignments in complainants, as alleged in the bill.

Deposition of Alfred W. Stott.

Examination-in-chief of ALFRED W. STOTT (on behalf of complainants) by Mr. MILLER:

Q. 1. State your name, age, place of residence, and occupation.

A. My name is Alfred W. Stott; my age, forty-five years; I live in San Francisco, and am by occupation a jeweller.

Q. 2. How long have you resided in San Francisco?

A. Nineteen years.

Q. 3. Are you acquainted with Mr. Alfred Graff, one of the complainants in this case?

A. Yes, sir.

Q. 4. Have you ever had any dealings with him in the matter of purchasing lamps?

A. Yes, sir; I have purchased a great many from him.

Q. 5. Have you ever purchased from him any lamps known as the "Diamond burner?"

A. Yes, sir.

Q. 6. Just look at this burner which I now hand you and state whether or not you have ever purchased from him any burners of that description.

A. Yes, sir; that is the kind of burner I have purchased from him.

Q. 7. Do you know what that burner is called?

A. I don't know any particular name, except "Graff's burner." I have never seen it anywhere else.

86 Q. 8. Have you used burners of that description?

A. Yes, sir; both at my house and at my store.

Q. 9. Where is your house?

A. On the corner of Steiner and Height street. When I built out there five years ago there was no gas there and I had to use burners, so I put in these burners.

Q. 10. What satisfaction have they given to you in your house there?

(Question objected to by respondents as immaterial and irrelevant.)

A. They are very good.

Q. 11. Have those burners any advantage over any other burners that you have seen or used?

(Question objected to by respondents as immaterial and irrelevant, and also as incompetent, being a matter that can be better shown by the patent.)

A. Yes; they give a better light—a clearer light, a whiter light—and they are more easily trimmed than any other burner that I have ever had.

Q. 12. You have had other burners?

A. Yes, sir.

Q. 14. You say you used these burners in your store?

A. Yes, sir.

Q. 15. Where is your store?
A. No. 3 Montgomery street.
Q. 16. What satisfaction did they give you in your store?

(Question objected to by respondents as incompetent, irrelevant, and immaterial.)

A. Very good.
Q. 17. How long have you used them in your store?

(Question objected to by respondents as immaterial and irrelevant.)

A. Five years.
Q. 18. Are you using them in your house now?
A. Yes, sir.

(The burner referred to in the testimony of this witness is introduced in evidence by complainant and marked "Complainant's Exhibit B.")

87 Cross-examination of ALFRED W. STOTT (by Mr. BOONE:)

Q. 1. You say you are a jeweler, Mr. Stott?
A. Yes, sir.
Q. 2. Where is your place of business?
A. No. 3 Montgomery street.
Q. 3. The jewelry store?
A. Yes, sir. It is under Masonic Temple.
Q. 4. Do you deal in lamps and lamp burners?
A. No, sir.
Q. 5. Then these lamps or burners which you have bought from Mr. Graff have been for your own use in your own house?
A. Yes, sir; and the store as well.
Q. 6. How many did you purchase from him?
A. Well, I suppose I must have bought eight or ten.
Q. 7. How many kinds of lamp burners do you use in your house and place of business?
A. Only Mr. Graff's.
Q. 8. You don't know anything about any other kind, do you?
A. Yes, sir; I do. I paid money enough for the trial. I have experimented a good deal with lamp burners.
Q. 9. What peculiar quality in this burner is it that makes it better than any other burner?
A. It is easier trimmed and I don't think there is any danger of explosion with that cap over it. The cap helps to clean it.
Q. 10. What do you refer to as a cap over it?
A. That cover over the wicks there. The wicks are close by the holes in the caps, which prevents any explosion.
Q. 11. Do you know how that is, whether it does prevent an explosion?
A. No, sir; I am not scientist enough to say, but I think it does.
Q. 12. That is merely a private opinion of yours?
A. That is all.
Q. 13. You never had an explosion, did you?

A. No, sir.

Q. 14. You never tried to explode a Graff lamp?

A. No, sir.

88 Q. 15. You don't know but that the same cause that would make an ordinary lamp explode would make this Graff lamp explode, do you?

A. No, sir; but I think this Graff lamp is safer.

Q. 16. You say you think. Do you know anything about it?

A. Yes, sir; I know positively that if wicks are just protected with a little hole, as that cap is, it is not so liable to explode.

Q. 17. Do you know whether it is more liable to explode than where there are holes in there?

A. Yes, sir; I should think so.

Q. 18. I asked you if you knew?

A. No, sir; I don't know. I couldn't prove it.

Q. 19. You only know that you have had a number of those burners and they have given you good satisfaction?

A. Yes, sir.

Q. 20. Now, I will ask you again what peculiar feature of this lamp is it which makes it, as you say, easier to keep clean and easier trimmed than other burners?

A. The cap at the top of these wicks. I only have to turn them up and run the burnt portion off the wicks.

Q. 21. That would apply to any lamp of that character where there are a number of small wicks arranged in a circle, wouldn't it?

A. Yes, sir; or anything that would guide the fingers.

Q. 22. Would not that same advantage apply to any lamp that had those features or separate wicks arranged in a circle and a place to guide the fingers?

A. Any other lamp like this might—I should think it would.

Q. 23. That is not the question I asked you. I asked you whether that same advantage would not apply to any other lamp that had a number of small wicks and had something to guide the finger in running it around?

A. Yes, sir; in the same manner.

Q. 24. Is there any peculiar construction or feature in that cap which gives it an advantage over one that had another platform level with the tops of the wicks to allow the finger to run around and clean it off?

A. I have never seen any of them, so that I don't know.

89 Q. 25. Then your experience has been confined exclusively to that kind of lamp that you hold in your hand. I mean so far as this style of lamp is concerned, with a number of small wicks arranged in a circle?

A. Yes, sir.

Q. 26. Now, that is the only feature of that lamp that makes it better than any other lamps you have seen?

A. No, sir; it gives a brighter and whiter light and gives more light than any other lamp I have ever seen.

Q. 27. Do you know what makes it do that?

A. Well, no; unless it is the passage of air through here which supplies it with oxygen.

Q. 28. Through where?

A. Inside and outside the wicks.

Q. 29. That advantage would belong to any other lamp that had wicks arranged in a circle, the same as that is, wouldn't it?

A. That I don't know; unless I saw the lamp and tried it.

Q. 30. Is there anything peculiar in the construction of that lamp which makes it better than any other lamp that you know of?

A. Except that it keeps cooler. It does not get so hot around the outside of the burner as other lamps do; but the chief object of using this lamp in my window is that I tried to get the best lamp I could, because lamp-light does not injure the gold, and gas turns it black. The carbureted hydrogen in the gas spots the gold, and the light from lamps does not.

(By agreement of counsel for the respective parties herein the reading of all the depositions taken or to be taken in this cause by the respective parties and the signing of the same by them, respectively, are waived.)

Deposition of William E. Stevens.

Examination-in-chief of WILLIAM E. STEVENS (on behalf of complainants, by Mr. MILLER):

Q. 1. State your name, age, place of residence, and occupation.

A. My name is William E. Stevens; my age is thirty-one years; I live in San Francisco, and I am a clerk for Yates & Co., wholesale dealers in paints, oils, and lamp stock, at 101 Front street, San Francisco.

90 Q. 2. How long have you been engaged in your present business with Yates & Co.?

A. Ten years.

Q. 3. Does any portion of that business consist in dealing in lamps and burners?

A. Yes, sir; a large portion of my business; formerly was in that particular line.

Q. 4. Have you had anything to do personally with that branch of business?

A. Yes, sir.

Q. 5. What have you had to do in that regard?

A. Well, do you refer particularly to the lamp business generally or these particular burners?

Q. 6. The lamp business generally?

A. The same as you would in any business—take orders and put them on the books and take them out sometimes.

Q. 7. Look at this burner now shown you, "Exhibit B," and state whether Yates & Co. have ever dealt in any burners of that description.

A. Yes, sir; they have.

Q. 8. Could you state about how long they have been dealing in lamp burners of that description?

A. Well, ever since Mr. Graff first got these burners. I couldn't say how long it is. I remember about how long it was since this burner first came out here, and that is several years ago.

Q. 9. Has Yates & Co. been dealing in these burners ever since then?

A. Whenever we get an order for these burners we deal in them; go over and get them from Mr. Graff and supply our customers with them.

Q. 10. That has been the case for how long?

A. Since Mr. Graff has been out here—for several years.

Q. 11. What satisfaction to your customers has this style of burners given, if you know?

(Question objected to by respondents as immaterial and irrelevant.)

A. Well, as far as I know, the burners have satisfied the customers, or otherwise they would not order them.

Q. 12. Have they ever expressed to you any dissatisfaction with the burners?

91 (The same objections by respondents.)

A. No, sir.

Q. 13. Did you ever see any of the burners in operation?

A. Yes, sir.

Q. 14. From your observations of the burners in operation, what has been the result?

A. The result has been favorable to the burner, as far as I might guess.

Q. 14. How has it been favorable?

A. It gives a good light.

Q. 15. What kind of a light?

A. What I mean by a good light is a large light and a bright light.

Q. 16. Have you ever heard any one of your customers express dissatisfaction with the quality of the burner?

A. Not to my knowledge.

Q. 17. Do you know or could you state any advantage that this burner has over any other style of burner?

A. I don't think I could; no, sir.

Q. 18. Your observation, then, is limited to the selling of these burners to your customers?

A. Yes, sir; that is right.

Q. 19. And the manner which they have been received by them?

A. Yes, sir.

Q. 20. Could you state, in general terms, about the extent that Yates & Co. have dealt in these burners?

A. Well, yes. We have probably had a dozen or two dozen orders for them.

Q. 21. Where did the orders come from?

A. From the country, all parts of the country; the interior, Marysville and Modesto, and so forth.

Q. 22. How did you receive the orders, personally or by letter?
A. Generally by letter.
Q. 23. How would they designate the burners when they sent for them?
A. They were called "the Diamond burner," if I remember right.

92 *Deposition of George F. Steele.*

Examination-in-chief of GEORGE F. STEELE (on behalf of complainants by Mr. MILLER):

Q. 1. What is your name, age, place of residence, and occupation?
A. My name is George F. Steele; my age, thirty-four years; I live in San Francisco, and am by occupation a canvasser for A. & A. Baker, of San Francisco.
Q. 2. In what business are they?
A. They are dealers in pictures and picture frames, racks, clocks, and other things sold on the installment plan.
Q. 3. Are you acquainted with Boesch & Bauer?
A. I know their store.
Q. 4. Where is their store?
A. On Mission street between First and Second.
Q. 5. What kind of a store is that?
A. A lamp store.
Q. 6. Do they sell lamp burners?
A. Yes, sir; and lamps.
Q. 7. Did you ever buy any lamp burners from them?
A. I did.
Q. 8. When?
A. It was some time last year; the first part of October or the latter part of September; just the exact date I couldn't say, but it was somewhere about that time.
Q. 9. Just look at this lamp burner which I now show you and state whether that is one you bought from them.
A. That is one similar to the one I bought from them. I bought one like that one time. It resembles the one very much.
Q. 10. What did you pay for it—how much?
A. About the rate of four dollars a dozen, I think it was.
Q. 11. You paid for it at that rate?
A. Yes, sir; at that rate.
Q. 12. Are you positive that it is exactly like the burner which you hold in your hand?
93 A. I think it was. I had reference to this cap here at the top of the burners.
Q. 13. For whom did you purchase the burner?
A. For Mr. Graff, the complainant.
Q. 14. Did he ask you to purchase the burner for him?
A. Yes, sir.
Q. 15. What did you do with the burner after you purchased it?
A. I turned it over to Mr. Graff.

(The burner referred to in the testimony of this witness is introduced in evidence by complainants and marked "Complainants' Exhibit C.")

Q. 16. Did you see any more burners in the store of Boesch & Bauer of that description?

A. Yes, sir; it was taken out of a box, and I should think there was eight or ten from where he got this one.

Q. 17. And you bought this one out of that lot?

A. Yes, sir.

Cross-examination of GEORGE F. STEELE (by Mr. BOONE):

Q. 1. How many did you buy?

A. There was two burners, I believe, I bought at the time—a 16 and 20 wick.

Q. 2. When was it you bought them?

A. As near as I can remember, I didn't take any particular note at the time, but it was the latter part of September or the first part of October last. I think maybe I am mistaken about the price of them. It may have been three dollars and a half or four dollars. I didn't take any particular notice of that when I bought them.

Q. 3. How do you know that is the date?

A. It was somewhere about that time—when the gas was turned off in South San Francisco.

Q. 4. For all you know, it might have been the last of October, might it not?

A. No, sir.

94 Q. 5. How do you know it was not?

A. Because, if I remember right, it was about the time the gas was turned off in South San Francisco. It was within ten days of the time the gas was turned off in South San Francisco.

Q. 6. When was it turned on?

A. About the middle of October. I wouldn't swear positively.

Q. 7. Then it was ten or twelve days on one side of that, either before or after?

A. It was before the gas was turned on.

Q. 8. Do you know how many days it was before the gas was turned on?

A. It was ten or twelve days.

Q. 9. Which was it, ten or twelve?

A. I couldn't say.

Q. 10. Then it might have been six days?

A. Yes, sir.

Q. 11. And it might have been three or four days, might it not?

A. It was longer than that.

Q. 12. You are positive of that?

A. Yes, sir.

Q. 13. Mr. Graff told you to go and buy that, did he?

A. Yes, sir.

Q. 14. He gave you the money to get and buy it?

A. Yes; I purchased it with his money.

Q. 22. How did you receive the orders, personally or by letter?
A. Generally by letter.
Q. 23. How would they designate the burners when they sent for them?
A. They were called "the Diamond burner," if I remember right.

92 *Deposition of George F. Steele.*

Examination-in-chief of GEORGE F. STEELE (on behalf of complainants by Mr. MILLER):

Q. 1. What is your name, age, place of residence, and occupation?
A. My name is George F. Steele; my age, thirty-four years; I live in San Francisco, and am by occupation a canvasser for A. & A. Baker, of San Francisco.
Q. 2. In what business are they?
A. They are dealers in pictures and picture frames, racks, clocks, and other things sold on the installment plan.
Q. 3. Are you acquainted with Boesch & Bauer?
A. I know their store.
Q. 4. Where is their store?
A. On Mission street between First and Second.
Q. 5. What kind of a store is that?
A. A lamp store.
Q. 6. Do they sell lamp burners?
A. Yes, sir; and lamps.
Q. 7. Did you ever buy any lamp burners from them?
A. I did.
Q. 8. When?
A. It was some time last year; the first part of October or the latter part of September; just the exact date I couldn't say, but it was somewhere about that time.
Q. 9. Just look at this lamp burner which I now show you and state whether that is one you bought from them.
A. That is one similar to the one I bought from them. I bought one like that one time. It resembles the one very much.
Q. 10. What did you pay for it—how much?
A. About the rate of four dollars a dozen, I think it was.
Q. 11. You paid for it at that rate?
A. Yes, sir; at that rate.
Q. 12. Are you positive that it is exactly like the burner which you hold in your hand?
93 A. I think it was. I had reference to this cap here at the top of the burners.
Q. 13. For whom did you purchase the burner?
A. For Mr. Graff, the complainant.
Q. 14. Did he ask you to purchase the burner for him?
A. Yes, sir.
Q. 15. What did you do with the burner after you purchased it?
A. I turned it over to Mr. Graff.

(The burner referred to in the testimony of this witness is introduced in evidence by complainants and marked "Complainants' Exhibit C.")

Q. 16. Did you see any more burners in the store of Boesch & Bauer of that description?

A. Yes, sir; it was taken out of a box, and I should think there was eight or ten from where he got this one.

Q. 17. And you bought this one out of that lot?

A. Yes, sir.

Cross-examination of GEORGE F. STEELE (by Mr. BOONE):

Q. 1. How many did you buy?

A. There was two burners, I believe, I bought at the time—a 16 and 20 wick.

Q. 2. When was it you bought them?

A. As near as I can remember, I didn't take any particular note at the time, but it was the latter part of September or the first part of October last. I think maybe I am mistaken about the price of them. It may have been three dollars and a half or four dollars. I didn't take any particular notice of that when I bought them.

Q. 3. How do you know that is the date?

A. It was somewhere about that time—when the gas was turned off in South San Francisco.

Q. 4. For all you know, it might have been the last of October, might it not?

A. No, sir.

94 Q. 5. How do you know it was not?

A. Because, if I remember right, it was about the time the gas was turned off in South San Francisco. It was within ten days of the time the gas was turned off in South San Francisco.

Q. 6. When was it turned on?

A. About the middle of October. I wouldn't swear positively.

Q. 7. Then it was ten or twelve days on one side of that, either before or after?

A. It was before the gas was turned on.

Q. 8. Do you know how many days it was before the gas was turned on?

A. It was ten or twelve days.

Q. 9. Which was it, ten or twelve?

A. I couldn't say.

Q. 10. Then it might have been six days?

A. Yes, sir.

Q. 11. And it might have been three or four days, might it not?

A. It was longer than that.

Q. 12. You are positive of that?

A. Yes, sir.

Q. 13. Mr. Graff told you to go and buy that, did he?

A. Yes, sir.

Q. 14. He gave you the money to get and buy it?

A. Yes; I purchased it with his money.

Q. 15. And you delivered it to him when you got it?
A. Yes, sir.

Deposition of B. S. Tower.

Examination-in-chief of BENJAMIN S. TOWER (on behalf of complainants) by Mr. MILLER:

Q. 1. State your name, age, residence, and occupation.
A. My name is Benjamin S. Tower; my age, fifty-four years; I live in Oakland, California, and I am a merchant by occupation—dealer in china, crockery, glassware, and lamps, and so forth—and my place of business is also in Oakland.
Q. 2. What is the name of the firm?
A. F. R. Stevenson & Co.
Q. 3. Are you a member of the firm or in the employ of the firm?
A. I am a member of the firm.
Q. 4. What is the number and the street of your place of business?
95 A. 1167 Broadway street.
Q. 5. Does the firm deal in lamp burners of any kind?
A. It does.
Q. 6. How long have you been dealing in lamp burners?
A. Between eleven and twelve years.
Q. 7. Have you had anything to do with that branch of the business personally?
A. I have.
Q. 8. In selling lamp burners?
A. I have.
Q. 9. Have you or the firm sold any considerable number of lamp burners?
A. We have.
Q. 10. To what extent, generally, have you dealt in them?
A. That is a question I cannot answer.
Q. 11. Well, have you dealt in them to a large or small extent?
A. Well, quite large. I would say large for a retail business.
Q. 12. Have you ever dealt in any lamp burners of the description of "Exhibit B?"
A. We have.
Q. 13. How long have you dealt in those burners?
A. I am not positive, but I think about three and a half years.
Q. 14. Where did you get them from?
A. From Graff.
Q. 15. What Graff is that?
A. A. S. Graff, I think, of Second street, San Francisco.
Q. 16. And afterwards your firm sold them to the trade?
A. We have been selling them for that length of time.
Q. 17. What satisfaction has this burner given to the purchasers to whom you have sold it?

(Question objected to by respondents as immaterial and irrelevant.)

A. The best.

Q. 18. Have you seen the burner in operation yourself?

(The same objections by respondents.)

A. I have.

Q. 19. Where?

(The same objections by respondents.)

A. In our old store we have been burning from one to three nearly every night since we first got them, and I will mention the library or reading-room of Oakland, and in different places where we have furnished them.

96 Q. 20. Under your observation what has been the efficiency and utility of that as a burner?

(The same objections by respondents.)

A. That burner is to my mind the best made—that is, I have known of but a single burner that would give as much light as this. The other day I saw one, but with that one exception this is the only burner I have ever seen that will give the same light from the same kind of oil that this will.

Q. 21. Wherein consists its advantage over any other burner?

A. In the intensity of the light. It is a whiter light; it gives a whiter light than any other burner that I know of.

Deposition of Albert Graff.

Examination-in-chief of ALBERT GRAFF on behalf of complainants (by Mr. MILLER):

Q. 1. State your name, age, place of residence, and occupation.

A. My name is Albert Graff; my age, forty-nine years; I live in San Francisco, and am by occupation a metal-worker and dealer in lamp stock. My place of business is at 47 Second street, San Francisco. I am one of the complainants in this case.

Q. 2. How long have you been engaged in the business of dealer in lamps and lamp burners?

A. Since 1881.

Q. 3. Whereabouts?

A. At first I commenced at No. 46 Second street and afterwards I moved to No. 47 Second street, in this city and county.

Q. 4. What is the nature of your business as a dealer in lamps and lamp burners?

A. I have a metal shop, and with that shop and the sale of the burners I make my living.

Q. 5. What do you call this burner here that is marked "Complainant's Exhibit B?"

(Question objected to by respondents as immaterial and irrelevant, and also as incompetent, the patent itself being the best evidence.)

97 A. I call it the "Diamond burner."

Q. 6. Is that the name by which it is known to the trade?

A. Yes, sir.

Q. 7. How are these lamp burners ordered when you receive orders for them?

A. They call it "Graff's Diamond burner" and "Graff's coal-oil burner," and sometimes they give other names to it, but that is the general name.

Q. 8. You are the Graff who is mentioned here as the owner of a one-half interest in this patent, are you not?

A. Yes, sir.

Q. 9. Where do you get the burners from; where are they manufactured?

A. They are manufactured in Germany—Berlin.

Q. 10. Then you import them and sell them?

A. Yes, sir.

Q. 11. To what extent have you dealt in burners of this description?

A. Oh, I sell quite a number of them; I suppose I have sold several thousand.

Q. 12. At what price do you sell these burners such as you hold in your hand?

(Question objected to by respondents as immaterial and irrelevant.)

A. Four or five dollars apiece.

Q. 13. You are still dealing in them now, are you not?

A. Yes, sir.

Q. 14. Have you ever seen these burners in operation—burning?

A. Yes, sir; I use them every day in my store.

Q. 15. Do you use them there now in your store?

A. Yes, sir.

Q. 16. Have they any advantage over any other burners?

A. Yes, sir; a great advantage.

Q. 17. Explain what.

A. I claim that these burners are perfectly safe, that they are not explosive, and have a steadier and whiter light than any other coal-oil burner in existence.

Q. 18. Is there anything peculiar in the construction in the burner which produces those results? And, if so, state what it is.

A. There is a series of pipes through which the air passes and keeps it cool, and as it keeps it cool it keeps it from exploding. In other burners which set on the font and which has not this series of pipes the coal oil gets heated and there is liability of explosion.

98 Q. 19. What other advantages do you claim for these burners?

A. The particular advantage is that on the top is this cap, which is easily cleaned, and it serves to keep it straight. In other burners you cannot keep it straight because it comes up uneven, and these burners may be kept straight on account of this cap at the top of the

burners, and it is easier to keep clean, and by keeping it straight it makes it solid and strong.

Q. 20. What kind of a flame does this burner emit?

A. It gives a more intense light than any other coal-oil burner.

Q. 21. How is it in regard to the steadiness of the light?

A. It is steadier than any other. These other burners smoke. This burner shows perfect combustion, which is not shown by other burners.

Q. 22. Have you ever had any dissatisfaction exhibited by any of your customers as to the utility and efficiency of this burner?

A. No, sir. I can show you lots of letters from people in the country indicating that they are well satisfied with them.

Q. 24. Where do your orders come from?

A. Over the whole country—from California and Oregon—and I have received orders from Alaska and Mexico, and even from the Sandwich Islands, Honolulu, and everywhere.

Q. 23. Are you acquainted with the defendants in this case—Emile Boesch and Martin Bauer?

A. Yes, sir; before I commenced my business I worked in their shop as a metal-worker.

Q. 25. When did you work in their shop?

A. I worked there two or three times. My business is not that of a regular metal spinner, and if they have a particular kind of work they call on me, and I work for them.

Q. 26. When was it that you worked for them?

A. I worked for them in 1876, 1878, and 1879. Sometimes I worked only a few days and sometimes months.

Q. 27. Where is their place of business?

A. 585 Mission street, I think it is, San Francisco.

Q. 28. Have you ever been in their place of business prior
99 to the commencement of this suit to look at any lamp burners they had?

(Question objected to by respondents as leading.)

A. No, sir; they had this burner exhibited in the window so that everybody could see it, and I saw it there.

Q. 29. What kind of burners did you see in their window?

A. Similar burners to "Exhibit C." There is even to-day one in the window there.

Q. 30. Were those that you saw like that burner, "Exhibit C?"

A. Yes, sir.

Q. 31. You saw them exhibited in the window?

A. Yes, sir; there is very little difference in it. The cap is the same.

Q. 32. You have a burner there in your hand marked "Exhibit C." Where did you get that burner from?

A. Mr. Steele, the last witness, bought it for me.

Q. 33. When did you get that burner, "Exhibit C," from Mr. Steele?

A. I looked in my book before I came here and it was marked in the book the 14th of September, 1886.

Q. 34. Did you tell him to go and get a burner for you?

A. Yes, sir; he is canvassing, and he came into my store and he said, "In South San Francisco there is no gas," and he said he would canvass for burners; but he was not satisfied with my price and said he could get them cheaper from the defendant, and I told him to go there and buy one and I would give him instead one of mine.

Q. 35. Is that burner, "Exhibit C," which you hold in your hand, the one that Steele brought to you?

(Question objected to by respondents as leading, and withdrawn.)

Q. 36. Where did you get that burner that you have in your hand?

A. I got it from Mr. Steele, and he bought it from Mr. Boesch.

Q. 37. Have you seen any other burners of that description in the defendant's place of business?

(Question objected to as leading, and withdrawn.)

Q. 38. Have you seen any burners like the one you have in your hand, "Exhibit C," in the possession of or exhibited by the defendants?

100 A. Yes, sir; I saw them where they exhibited them in the fair in San Francisco, at the mechanics' pavilion—at the Mechanics' Fair in the fall of 1886.

Q. 29. In what month of 1886 was that?

A. I think it was in the months of October and November, 1886.

Q. 40. When was the time that you saw the first burner of the kind now held in your hand, "Exhibit C," in the possession of the defendants or exhibited by the defendants?

(Question objected to by respondents as immaterial and irrelevant.)

A. I saw this same burner—I know he dealt in these burners for two years—infringing these burners.

Q. 41. Never mind about infringing. I asked you when you first saw them in the possession of the defendant?

A. It is about two years ago now.

Q. 42. Where were they when you first saw them?

A. I saw them first in the window. A gentleman came along and told me that he saw them in the window of the defendants' place of business and I went there and saw them myself.

Q. 43. Were the burners you saw in the window the same as that which you hold in your hand, "Exhibit C?"

(Question objected to as leading, and withdrawn.)

Q. 44. What kind of burners were those that you then saw in the defendants' window?

A. He had three sizes of them—12, 16, and 20 wicks.

Q. 45. What was the general character of them?

A. The same thing as mine.

Q. 46. How did they compare with the burner, "Exhibit C," in regard to their construction?

A. There was very little difference. The general character is the same, and especially the cap at the top of the wick is the same, but they were formed a little differently.

101 Cross-examination of ALBERT GRAFF (by Mr. BOONE):

Q. 1. Have you got a good memory?

A. Yes, sir; but not especially for dates.

Q. 2. Then your memory is not very good as to dates?

A. No, sir; that is because I cannot remember well the dates.

Q. 3. You say that some time ago you saw some lamp burners similar to the one you hold in your hand in Mr. Boesch's window?

A. Yes, sir.

Q. 4. How came you to see them there?

A. He had them right in the show window, and I saw them from the street.

Q. 5. Did you take any of them in your hand?

A. No, sir; when I passed by there I saw them in the show window.

Q. 6. That is, you simply saw in their show window some lamp burners that looked like this "Exhibit C?"

A. Yes, sir.

Q. 7. You did not take them in your hand and examine them, did you?

A. No, sir.

Q. 8. Were they burning in their window when you saw them?

A. No, sir.

Q. 9. Did they have a chimney on?

A. He had chimneys on the shelf, too.

Q. 10. Did the burners have chimneys on when you saw them?

A. No, sir.

Q. 11. How many were there?

A. Sometimes a dozen and sometimes only two or three in the show windows.

Q. 12. Was there any other kind of lamp burners in the show window at the same time?

A. Yes, sir; every description of chimneys and burners there at the same time.

Q. 13. How many kinds of burners did he have in the windows?

A. I didn't count them; but he had other burners—common burners—and he had standing lamps there.

Q. 14. The windows were full of burners and lamp articles, were they not? The window, when you saw these burners, was full of other burners and lamp articles, was it not?

A. Yes, sir.

Q. It was simply a show window on the street, wasn't it?

A. Yes, sir.

102 Q. 16. And you were passing along the street and saw them in the window?

A. Yes, sir.

Q. 17. You didn't take them in your hand and examine them closer, did you?

A. No, sir; I did not those in the window.

Q. 18. Now, you told Mr. Steele to go down and get that burner, didn't you?

A. Yes, sir. He told me he could get them cheaper there, and I told him to go and get it; and after he bought it he returned it to me, as I said I would give him one of mine for it.

Q. 19. And that is the one you hold in your hand now—"Exhibit C?"

A. Yes, sir; I am positive of it.

Q. 20. And you have had that in your possession all the time since then?

A. Yes, sir; up to the time I gave it to my counsel in this case.

Deposition of Martin Bauer.

Examination-in-chief of MARTIN BAUER on behalf of complainants (by Mr. MILLER):

Q. 1. State your name, age, place of residence, and occupation.

A. My name is Martin Bauer; my age, thirty-nine years; I live in San Francisco, and am by occupation a lamp manufacturer, and am a member of the firm of Boesch & Bauer.

Q. 2. You are one of the defendants in this case?

A. Yes, sir.

Q. 3. And you are in partnership with Mr. Boesch?

A. I am.

Q. 4. How long have you been in partnership with him?

A. A little over two years.

Q. 5. And your place of business is 585 Mission street, San Francisco?

A. Yes, sir.

Q. 6. Has your firm during the last two years, during which you have been in partnership with Mr. Boesch, sold any lamp burners like the one I now show you, marked "Exhibit C?"

A. Yes, sir.

Q. 7. Do you recognize that burner which I show you?

A. Yes, sir.

103 Q. 8. Is that one of the burners you sold?

A. Yes, sir; I suppose so. It looks like it.

Q. 9. At any rate, you have sold burners like that, if that is not the one you sold?

A. Yes, sir.

Q. 10. That was in this city and county?

A. Yes, sir.

Q. 11. To whom did you generally sell them?

A. I couldn't say as to that. They were sold to customers of ours, and to the trade generally. I couldn't recollect the names of people I sold them to.

Q. 12. Are you still engaged in selling them?

A. Yes, sir.

Q. 13. What do you call those burners—the name of them?

A. "The Diamond burner."
Q. 14. You don't manufacture them, as I understand you?
A. No, sir.
Q. 15. Where do you get them from?
A. From Germany.
Q. 15½. Import them from Germany and sell them?
A. Yes, sir.
Q. 16. How much do you sell an article of that description—"Exhibit C"—for?
A. Take most anything I can get; take three dollars and a half or four dollars.
Q. 17. You sell different sizes?
A. Yes, sir.
Q. 19. How many sizes?
A. Three.
Q. 20. What sizes are they?
A. We call them, according to the wicks, 12, 16, and 20.
Q. 21. That is a 20-wick burner that you hold in your hand—"Exhibit C"—is it not?
A. Yes, sir.
Q. 22. When was it that you sold burners of this description, as you have stated?
A. Well, I presume it is about a year and four months.
Q. 23. You have been selling them during that time?
A. Yes, sir.
Q. 24. You exhibited them at the Mechanics' Fair, did you not?
A. Yes, sir.
Q. 25. When?
A. In August and September of last fall.
Q. 26. In this city and county?
A. Yes, sir.

104 Cross-examination of MARTIN BAUER (by Mr. BOONE):

Q. 1. How long have you been in the lamp business?
A. About ten years.
Q. 2. Do you know how long that style of burner has been on the market here or in Europe or anywhere?

Mr. MILLER: I object to any evidence of the burner being in use in Europe or any other country than the United States on the ground that use in a foreign country cannot affect an American patent.

Q. 3. Do you know how long it has been in use anywhere?
A. Yes, sir.
Q. 4. What style do you call it?
A. Either the "Mitrailleuse" or "Diamond burner."

Mr. MILLER: I further object to any such testimony on the ground that no notice of anticipation set up, and that no notice has been given in the answer or otherwise of any proof or prior knowledge of any invention described in the patent, and no notice has been given

of any of the special offences enumerated in section 4920 of the Revised Statutes.

(It is agreed by both complainants and respondents that the objection shall be considered as interposed to each question asked this witness on cross-examination.)

Q. 5. How long has that style of burner been in use, to your knowledge?

A. I think I first seen that burner, if I am not mistaken, about 1881, or somewhat sooner, maybe; I couldn't say exactly.

Q. 6. Where was it that you saw it in use then?

A. In Mr. Graff's shop, the complainant, in this city.

Q. 7. Just take these two burners, Exhibits B and C, and tell me whether you find any difference in the construction of the cap or top plate of the two burners; any difference in the burners with regard to the cap or top plate.

A. Yes, sir; I find they are different.

Q. 8. Just state what the difference is.

A. Half of the cap is open between the tubes in "Exhibit C," while in "Exhibit B" it is closed.

105 Q. 9. Now, in the model, "Exhibit B," how far inward does the top plates extend inside of the tubes?

A. Well, about a small sixteenth of an inch.

Q. 10. Is not the inward edge of that plate in "Exhibit B" continuous, extending entirely around the surface, a smooth inside edge?

A. Yes, sir.

Q. 11. Now, in "Exhibit C" you find the inner edge is scalloped, the inner edge of the top plate, don't you?

A. Yes, sir.

Q. 12. The scallops extend in between the tubes, do they not?

A. Yes, sir.

Q. 13. Now, do you find the extent or the thickness of the upper inner edge of that plate to be any thicker, practically, than the tube itself?

A. Not any more than the thickness of the metal.

Q. 14. Do you find in the model, "Exhibit C," that the top plate excludes or closes the space entirely between the upper end of the tubes?

A. It admits air there.

Q. 15. How is it with "Exhibit B?" Does it exclude air entirely from between the tubes?

A. Yes, sir.

Q. 16. And it does not, you say, in Exhibit C?

A. No, sir.

Q. 17. Then you find that the cap in "Exhibit C" or the top plate is so constructed that the air can, to a certain extent, get between the tubes?

A. Yes, sir.

Q. 18. And at least one-half or nearly a half of the diameter of the tube is exposed to a current of air?

A. Yes, sir.

Q. 19. What is the object of that top plate in "Exhibit C?"

A. The object is to hold that burner together, to hold those tubes together, and the more opening you get between the top of the tubes the better the flame you get.

Q. 20. Suppose the air was admitted entirely around each tube, would it be any detriment to the lamp, or a benefit?

A. That would be a benefit.

Q. 21. Then suppose that there was nothing but a plate at the top extending around the outside, a ring to hold the tubes in position, how would that compare with a lamp having a full cap or top plate on?

106 A. The principle of the light would be about the same.

Q. 22. Wouldn't it be better where there was no closing of the space between the wicks?

A. Well, I should think it would; if the outside should be open it would not, but having some opening it would be better.

Q. 24. What is the object in scalloping the inner edge of the top plate in order to allow the air to get to the flame?

A. It would make it better; the flame gets whiter by getting more air to it.

Q. 25. Then, if I understand you, the difference between those two lamps, "Exhibits B and C," is that in "Exhibit B" the top plate or cap is made so as to close the space entirely between the tubes and allow no air to get to it?

A. Yes, sir.

Q. 26. While in "Exhibit C" it is not closed entirely, but the air is admitted to the flame about half the diameter of each wick?

A. Yes, sir.

Re-examination of MARTIN BAUER (by Mr. MILLER):

Q. 1. You claim that "Exhibit C" is a better burner than "Exhibit B?"

A. Yes, sir; I do.

Q. 2. Because the inside of the cap is scalloped instead of being straight?

A. Yes, sir.

Q. 3. And its being scalloped enables more air to come to the wick, does it?

A. Yes, sir.

Q. 4. And the more air that comes to the wick the better the flame?

A. Up to a certain point.

Q. 5. Up to what point is it desirable to have the air there?

A. It is pretty hard to tell; you can only tell by seeing them work.

Q. 6. Why don't you have the space between the wick tubes entirely free and not closed at all?

A. Because the tubes must have something to strengthen them together; they must not be too loose.

107 Q. 7. But so far as the light is concerned wouldn't that be better?

A. Yes, sir.

Q. 8. Why would that be better, so far as the light is concerned?

A. Because more air gets to the flame.

Q. 9. Suppose you had the tubes bound together by a ring on the outside so as to hold them together, and suppose that between the tubes it was free and uncovered, why wouldn't that be a better burner than either of these?

A. That could only be done by experiment.

Q. 10. Is it your judgment that it would be a better burner?

A. That I couldn't say; a slight difference in construction makes a great difference; as soon as you get too much air it breaks the chimney.

Q. 11. Do you know whether or not it would be an advantage if the space between the wick tubes was entirely free to admit the passage of a current of air?

A. I don't know without experiment.

Q. 12. Now, before these burners were made at all, is it not a fact that the space between the wick tubes was left uncovered and the wick tubes were just bound together with a ring on the outside before the "Diamond burner" was made?

A. I don't know whether there was or not.

Q. 13. Did you ever see any lamps of this general description—that is to say, the "Mitrailleuse lamp"—before the "Diamond burner" was made?

A. No, sir.

Q. 14. You never saw them?

A. No, sir, except a similar size; but I couldn't say if that was before that was made.

Q. 14½. Then you don't know what the construction of the "Mitrailleuse" burner was before the "Diamond burner" was made?

A. No.

Q. 15. Now, the only difference between these two burners, "Exhibit B" and "Exhibit C," is that the interior of the cap in "Exhibit C" is scalloped and the interior of the cap of the other is not scalloped. Is that so?

A. Yes, sir.

Q. 16. That is the only difference between "Exhibits B" and "C," is it?

A. Yes, sir.

(By Mr. BOONE:)

Q. 17. You are speaking of the cap now alone, are you not?

A. Yes, sir.

Q. 18. You were not speaking of the other parts?

A. No, sir.

108 (By Mr. MILLER:)

Q. 19. I want you to give me your best judgment as to how far

there ought to be an open space between the wick tubes so as to give a more perfect combustion?

A. If the scallops in "Exhibit C" were indented about a sixteenth of an inch further in the top cap it would be still better.

Q. 20. Should they go as far as the center of the wick tube you think it would be still better?

A. Yes, sir.

Q. 21. But no further than that?

A. Well, I wouldn't advise it. I haven't tried it.

Q. 22. Why didn't you make these scallops in "Exhibit C" further down if it would make a better lamp?

A. It would probably weaken the connection of the tube.

Q. 23. You say it would weaken the connection of the tubes to make the scallops deeper?

A. Yes, sir; I think it would.

Q. 24. Is not this cap an advantage in admitting of the wicks being easily cleaned over what was used before?

A. No, sir; I don't see anything of that kind at all—that is, if the burners have got that top burner on they can be cleaned just as easy as that.

Q. 26. You heard Mr. Stott testify here this morning, did you not?

A. I believe I did.

Q. 27. Didn't you hear him testify that his experience was that they were more easily cleaned or wiped off than any he had ever used?.

A. Yes, sir; I think he said so.

Q. 28. Don't you think that is so?

A. Not at all.

Q. 29. Suppose there was no cap there at all, could they be cleaned as easily?

A. Yes, sir; they could be cleaned just as well. Of course, having so many of these tubes in, without a cap it would be always likely to get the tubes bent, they are so light.

Q. 30. Would it be as easy to clean a burner without a cap or top plate as it would be with it?

A. No, sir; I don't think it would.

Q. 31. With a cap, then, you think it would be easier cleaned?

A. Yes, sir.

Q. 32. Does not the cap also protect the tubes from burning to a certain extent?

A. No, sir; not a particle.

109 Q. 33. It protects them in the way of holding them firmly, does it not?

A. Yes, sir.

Q. 34. Then you think it would be better to have some kind of a cap on than to have a ring on the outside?

A. Yes, sir; it has got to have something to hold them together.

Q. 35. Does not that cap do something besides holding the tubes together?

A. Not as I can see.

(By Mr. BOONE:)

Q. 36. Suppose the tubes were held together by another device; suppose they were positively held together. Now, why couldn't they be just as easily cleaned as if the burner had a cap on it?

A. They could be cleaned just as well.

Q. 37. The cleaning of the wicks is merely a matter of running the finger around on top of the tube, isn't it?

A. Yes, sir.

Q. 38. And you could do that in one case as well as the other?

A. Yes, sir.

Q. 39. Then do you consider it to be anything else than simply a device for holding the tubes together?

A. That is all.

Q. 40. It doesn't affect the value of the light, does it?

A. No, sir.

(By Mr. MILLER:)

Q. 41. Would it not be difficult to clean the sides of the tubes if there was no cap there at all?

A. Not any more than it would now.

Q. 42. As it stands now, the sides of the tubes don't get dirty at all, do they?

A. No, sir; the tubes would not get any dirtier than the cap does now. There would be some little on the side.

Q. 43. There would be some carbon there?

A. Only on the top; around the edges.

Q. 44. But the way the cap is there, there cannot be any?

A. No, sir; but it would be on the outside of the ring.

Q. 45. That could be easier wiped off, couldn't it?

A. Yes, sir.

Q. 46. How would it be on the inside of the tube? That would be harder to clean off, wouldn't it?

110 A. Probably it would. The main thing is to keep the tubes on the inside clean. The outside doesn't matter. The tubes in "Exhibit C" can be cleaned more easily on the inside than the tubes in "Exhibit B."

Q. 47. In "Exhibit B" would the tubes become solid there with the deposit of carbon?

A. Yes, sir; it settles on the inside of the tubes under the cap.

Q. 48. Doesn't the cap prevent that from happening?

A. No, sir.

Q. 49. The flame is on the upper side, is it not?

A. Yes; the flame is on the top.

Q. 50. Then how is the carbon going to be deposited below or beneath the cap?

A. Well, it always leaves something on it. It is not as much as on the top, but it would leave something.

Q. 51. It would not leave as much in "Exhibit B," would it?

A. It would leave more, I think.

Q. 52. Is not there a projection on the top of the cap in "Exhibit B?"

A. Yes, sir.

Q. 53. What is the cause of the deposit of carbon on the inside of the tubes in "Exhibit B?"

A. I couldn't particularly say.

Q. 54. Do you know what causes a deposit of carbon from a flame?

A. I suppose from the heat and burning of the wicks and one thing and another.

Q. 55. What is the philosophy of it, do you know?

A. From a bad oil, I suppose.

Q. 56. Where would it be deposited and what causes it to be deposited?

A. I couldn't say, particularly.

Q. 57. Then if it is caused from bad oil the efficiency of these lamps would depend upon the kind of oil you used, wouldn't it?

A. Yes, sir; that is the case with any burner.

Q. 58. You know what carbon is, do you?

A. Yes, sir.

Q. 59. What is it?

A. What kind of carbon do you speak of? There are different carbons, isn't there?

Q. 60. Well, take a coal-oil light and tell me where the carbon comes from.

A. The light or heat.

111 Q. 61. What causes it to be deposited?

A. I don't know.

Q. 62. Then your testimony that you have given regarding the deposit of carbon on the inside of these tubes is simply your opinion, is it?

A. Yes, sir; that is what it is.

Q. 64. You don't know anything more definitely about it than that, do you?

A. I know that the crust comes on the inside of the tube more than on the outside.

Q. 65. Why does the crust come on the inside more than on the outside?

A. It is from the hot air. There is more hot air on the inside.

Q. 66. Don't you know that carbon is deposited from a flame by the flame coming in contact with a colder substance, and so condenses the carbon from the form of gas into a solid?

A. I don't know.

Q. 67. Do you know anything about the philosophy of flame?

A. Yes; some.

Q. 68. Just explain what you know about it. How is the flame caused?

A. From hot and cold air.

Q. 69. Is that the only way?

A. From the oil and wicks and one thing or another.

Q. 70. Is that all you know about it?

A. I suppose so. Flame, of course, comes from oil and wick and a certain amount of air.

Recross-examination of MARTIN BAUER (by Mr. BOONE):

Q. 1. You have had practical knowledge of lamps?

A. Yes, sir.

Q. 2. And you know it is a fact that a crust or carbon is deposited on the tubes on a lamp of this character?

A. Yes, sir.

Q. 3. But how it is done you don't know?

A. Not exactly.

Q. 4. But you know as a fact that it is there. After a lamp has been burning you know there is that crust or carbon there, and you know it forms more on the inside than the outside of the tubes?

A. Yes, sir.

112 Q. 5. But that is not hard to remove, is it? You could remove that by simply rubbing the tube in any kind of a lamp, couldn't you?

A. Yes, sir.

Q. 6. Does that crust or carbon particularly affect the value of the oil?

A. Yes, sir; it does.

Q. 7. In what regard; any more than in the reflection?

A. No, sir; it stops the drafts.

Q. 8. So long as it does not stop the draft it does not interfere, does it?

A. No, sir; it does not interfere as long as it doesn't stop the draft.

Q. 9. And by blackening it up it prevents a certain amount of reflection, doesn't it?

A. Yes, sir.

Q. 10. But in either case you say it is not a material thing or difficult thing on any of these burners or any burner to clean off any carbon or crust that accumulates? That would not be important, at all, would it?

A. No, sir.

Q. 11. Do you consider that the claim of the inventor here, this cap, prevents in any manner the formation of a crust?

A. No, sir.

Q. 12. Do you see any particular advantage in that cap in "Exhibit B" over and above the construction of "Exhibit C" as regards the top plates?

A. I find that "Exhibit C" is better.

Q. 13. Have you tested both of them?

A. Yes, sir.

Q. 14. And that is the result of your practical test?

A. Yes, sir.

Q. 15. I will ask you if you have not had in your shop a "Mitrailleuse" lamp where the end of the tubes are not entirely free?

A. I don't know, I am sure.

Re-examination of MARTIN BAUER (by Mr. MILLER:)

Q. 1. Then you think that the claim of this patent is of no value, do you, in regard to this cap or top plate?

A. I don't know whether it is or not.

113 Q. 2. As a manufacturer, do you consider this cap in "Exhibit B" of any value?

A. What do you mean by that?

Q. 3. You know what value is. Do you consider that of any value?

A. Not as much as that cap in "Exhibit C."

Q. 4. That is not the question. I asked you if you considered it of any value?

A. Only as strengthening the tubes and holding them together.

Q. 5. And in that regard you don't find it any better than a ring put around the outside?

A. No, sir; not for the light.

Q. 6. What for would you consider it no better?

A. Because it don't get so much air. It is of advantage because it don't get too much air.

Q. 7. If it only had a ring wouldn't it be a harder matter to clean the carbon off of the tubes? The carbon would be deposited all around the tubes, wouldn't it, and wouldn't it be harder to clean out between the tubes?

A. No, sir.

Q. 8. Did you ever have any burners in your place of the same kind as "Exhibit B?"

A. No, sir; not as large as that, but smaller.

Q. 9. What size?

A. 16 wicks.

Q. 10. What did you do with those of a smaller size?

A. I compared them with "Exhibit C" and tested them with that.

Q. 11. Did you sell them?

A. No, sir. We never had only one sent to us.

Q. 12. Where did you get that one?

A. I don't know. It might have come in to us to be repaired.

Q. 13. You never sold any, then, that had a cap like this in "Exhibit B?"

A. No, sir.

Q. 14. But those you have sold were all like "Exhibit C?"

A. Yes, sir; the smaller ones are, but the large ones are more cut out than "Exhibit C."

(The time within which testimony may be taken herein is extended, by agreement of counsel for the respective parties herein, to and including the 20th day of April, 1887.)

(Examination continued, by agreement of counsel, subject to agreement and notice.)

114 SATURDAY, *April 23rd*, 1887.

Present: Mr. Miller, of counsel for complainant; Mr. Boone, of counsel for respondents.

Deposition of Albert Graff.

Examination-in-chief of ALBERT GRAFF on behalf of respondents (by Mr. BOONE):

Q. 1. How long have you lived in San Francisco?

A. Since 1871.

Q. 2. What relation, if any, are you to W. Graff, one of the patentees in this case?

A. William Graff is my brother.

Q. 3. Where does he reside?

A. He lives in Berlin, Germany.

Q. 4. Where is Carl Schwintzer?

A. He is William Graff's partner.

Q. 5. Where is he—where does he live?

A. In Berlin, Germany.

Q. 6. How much did you pay Mr. William Graff for your interest in this patent?

A. First, I got one-sixteenth, for which I paid one hundred dollars, and after that I got seven-sixteenths more, which would make a full half, and I gave him a royalty every year. I gave my brother a royalty every year of one hundred and fifty dollars on that seven-sixteenths.

Q. 7. Have you not a contract with your brother or with the firm of Schwintzer & Graff?

A. Yes; I made a contract with them. Of course, I have it only written in German. I have a written contract.

Q. 8. Where is that contract?

A. I haven't it here.

Q. 9. Have you a copy of it?

A. Not here. I think I have a copy of it at my home.

Q. 10. Will you produce it in this case?

A. Yes; I can if you want it.

Mr. BOONE: In view of the testimony of Mr. Graff, I state to counsel that I will withdraw my admission to the fact that the title to rights under this patent is in complainant.

115 Mr. MILLER: I object to counsel withdrawing his admission, and I do not accept it. He has already admitted that the title is in complainant. He has seen the assignment, and our testimony is now closed, and we refuse to accept a withdrawal of counsel's admission.

Mr. BOONE: In view of the disclosure just now made on the part of respondent Graff, that the assignment which was presented to me, and on which my admission to that assignment of title was based, is not a complete assignment, I withdraw my admission to the fact that the rights under this patent are in complainant. This withdrawal need not embarrass complainant in this case, as he has

his assignment here; and Mr. Graff has just testified that he has in his possession the contract, to the admission of which I will not object, and they have, therefore, the full evidence of their title in their possession, and I require that it be produced in the case.

(By Mr. BOONE:)

Q. 11. Are you familiar, Mr. Graff, with the state of the art relating to Mitralleuse lamp burners?

A. No, sir; I never saw this burner before. I have worked in all the big factories in Vienna, Berlin, and Paris and I never saw one of them before, and I never heard of them. I never saw a similar burner. I have worked in the lamp trade and I never saw a burner like this before.

Q. 12. Do you know whether or not the patentees of this patent have had any litigation in regard to it?

(Question objected to by complainant as irrelevant, incompetent, and immaterial.)

A. Yes, sir; they have had some lawsuits.

Q. 13. Do you know whether or not the patentees in this case had any lawsuits in Germany with W. H. Hecht in regard to this patent—the German patent?

Mr. MILLER: I object to the question as irrelevant, incompetent, and immaterial under the pleadings as they stand, and on the further ground that nothing that may have been done on the German patent can affect the American patent.

A. Yes, sir; I have heard that he had such a suit.

Mr. BOONE: I now introduce in evidence a copy, certified by the United States consul general at Berlin, of the opinion and
116 decision in the case of Schwintzer & Graff *vs.* W. H. Hecht, in the first chamber of the royal State court at Berlin, in the session of March, 1882 (marked "Respondents' Exhibit 1").

Mr. BOONE: I also introduce in evidence a translation of "Respondents' Exhibit 1" (marked "Respondents' Exhibit 2").

Mr. MILLER: I object to "Respondents' Exhibit 1" on the ground that it is incompetent, immaterial, and irrelevant, and, second, on the ground that it is not properly certified—that is, it is not certified in such a way as to allow it to be introduced in evidence in the circuit court of the United States; third, on the ground that it is in a foreign language and therefore utterly unintelligible, and I do not know what it is and I cannot read it.

I object to the purported translation, "Respondents' Exhibit 2," on the ground that it is also incompetent, irrelevant, and immaterial; second, on the ground that there is no evidence here to show that it is a correct translation and no evidence to show who made the translation.

(By Mr. BOONE:)

Q. 14. You read German, don't you, Mr. Graff?

A. Yes, sir.

Q. 15. Can you read English?

A. Yes, sir; but to translate it word by word and find the right meaning for that, I would not say I could do that, but I would like anyhow to read it.

Q. 16. Well, can you compare German and English sufficiently to tell whether an English translation is correct or incorrect?

A. Yes, sir; I can.

Q. 17. Will you examine the translation which I hand you and the original German document which I also hand you, being "Respondents' Exhibit 1," and state whether or not, according to the best of your knowledge and belief, it is a correct translation of the original?

A. I think it would take me an hour to read this over and see if it is correct.

Q. 18. I request that you will examine it and state whether or not the translation is correct, however long a time it may require to make the examination.

117 Mr. BOONE: Pending the examination of this document by the witness, I will introduce in evidence an affidavit of William Herrmann Hecht made before the consul general of the United States of America at Berlin on the 29th day of June, A. D. 1886.

Also an affidavit of Robert Koeppen made before said consul general of the United States at Berlin.

The said two affidavits attached together are marked "Respondents' Exhibit 3," and are introduced in evidence in connection with and as a part of "Exhibit 1."

Mr. MILLER: We object to each and all of them as incompetent, irrelevant, and immaterial.

Deposition of Martin Bauer.

Examination-in-chief of MARTIN BAUER on behalf of respondents (by Mr. BOONE):

Q. 1. You have been sworn in this case before and examined as a witness for complainant, have you not, Mr. Bauer?

A. Yes, sir.

Q. 2. I believe you testified in this case that you were a partner of Mr. Boesch in the business of manufacturing lamps and such articles in this city and county, did you not?

A. Yes, sir.

Q. 3. And that you were one of the defendants in this case?

A. Yes, sir.

Q. 4. Do you manufacture Mitrailleuse lamps similar to the ones put in as exhibits in this case?

A. No, sir.

Q. 5. Did you ever manufacture any?

A. No, sir.
Q. 6. Where do you get them?
A. We get them from Germany.
Q. 7. From whom do you purchase them?
A. From W. H. Hecht, in Berlin, Germany.

Mr. MILLER: I object to the last question and all others on the same subject as incompetent, irrelevant, and immaterial.

(It is agreed by both complainant and respondents that the above objection shall be considered as interposed to each question asked this witness on this subject-matter.)

Q. 8. Have you any bill of lading or bill for any of these lamps?
A. Yes, sir; I have.
118 Q. 9. Have you it with you?
A. Yes, sir.
Q. 10. Will you let me see it?

(Witness produces the bill above referred to.)
(The bill or bill of lading referred to, consisting of four sheets of paper, after being produced by the witness, is introduced in evidence by respondents and marked "Respondents' Exhibit 4.")

Mr. MILLER: I object to the introduction in evidence of the document, "Exhibit 4," first, because it is incompetent, irrelevant, and immaterial under any circumstance, and, second, on the ground that it is in a foreign language and is not intelligible, and on the further ground that it is not authenticated in any way and not proven in any way.

Q. 11. Mr. Bauer, take that "Exhibit 4" and state whether or not it contains any charge for burners similar to the exhibit in this case; whether there are included in it any charges for burners of the kind of "Exhibit C."
A. There are.
Q. 12. Read those charges; state what they are.
A. The bill includes one hundred sixteen-wick burners, and another charge is for one hundred twenty-wick burners.
Q. 13. Which items in that bill do you refer to?
A. The first and second items, being those checked with a blue pencil.
Q. 14. What is the date of that bill, Mr. Bauer?
A. The date is the 15th of October, 1886.
Q. 15. What is the first sheet of that "Exhibit 4?"
A. It is the items of a bill of goods that we purchased from W. H. Hecht, of Berlin.
Q. 16. What is the second sheet?
A. It is the certificate of the consul general of the United States at Berlin to the effect that the first page referred to was a bill of goods intended to be shipped to the port of San Francisco from W. H. Hecht, of Berlin.
Q. 17. What is the third sheet of "Exhibit 4?"

A. It is the policy of insurance on the articles mentioned in the first sheet.

Q. 18. What is the fourth sheet?

A. The bill of lading.

119 Q. 19. All relating to the articles stated on the first sheet of your shipment?

A. Yes, sir.

Q. 20. Did you buy the goods on the date therein stated?

A. Yes, sir.

Q. 21. From William H. Hecht, in Berlin, Germany?

A. Yes.

Q. 22. Where is Mr. Boesch?

A. I believe he is at present at Paris. I had the last news from him in Paris.

Q. 23. Do you know what he is doing there?

A. He is there on account of his health. He has been under the treatment of a doctor there.

Cross-examination of MARTIN BAUER (by Mr. MILLER):

Q. 1. When did you receive the goods mentioned in the bill of lading, "Exhibit 4?"

A. Well, I couldn't really tell exactly, but I can refer to the books and tell. I think it was nearly in the end of the year 1886. I believe it was in December, 1886, if I am not mistaken.

Q. 2. The bill is dated the 15th of October, is it not?

A. Yes, sir.

Q. 3. That is the date they were sent to you from Germany, then?

A. I believe it is; yes, sir.

Q. 4. Had you gotten any goods from this man Hecht prior to this; any lamp burners of the description of those in suit before this bill of October 15th, 1886?

A. Yes, sir.

Q. 5. Did you get bills of lading for them, too?

A. Yes.

Q. 6. Where are those bills of lading?

A. I don't know exactly. I haven't got them.

Q. 7. Where did you get those?

A. Which ones?

Q. 8. The ones you got before this one.

A. We got them just about a year before that, only once before.

Q. 9. How many did you get before?

A. I couldn't tell without looking at the bills.

120 Q. 10. Was it more than one bill?

A. It was about the same thing, I suppose. I didn't take any particular interest in the first bill we had. It might be around somewhere.

Q. 11. How many bills have you had in all?

A. I don't know. I couldn't say exactly, but I can tell by looking at the books.

Q. 12. How many of these lamp burners did you get in the first bill?

A. I say I couldn't tell without looking at the bills.

Q. 13. Was it as many as a hundred?

A. I don't think it was. Really, I couldn't say.

Q. 14. Well, did you get more than one bill before this one?

A. I don't think so.

Q. 15. Do you think it was only one?

A. I think it was. I am not sure of it.

Q. 16. How did you come to order these things from this man Hecht?

A. I don't know how it was. Mr. Boesch ordered them.

Q. 17. Was he in San Francisco when he ordered them or was he in Germany?

A. I believe he was in Germany. I believe he was, but I am not positive about it. He done it when he was out there first, if he done it.

Q. 18. When did Mr. Boesch go to Europe?

A. He went twice. Do you mean the first time or the last time?

Q. 19. The last time.

A. I believe it was in September, 1886. I think it was, but I am not positive about it. I think it was about that time.

Q. 20. Did he order these lamp burners while he was there in Europe—this last lot?

A. No, sir; I believe we ordered them before he went away.

Q. 21. What have you done with those two hundred lamp burners mentioned in this bill, "Exhibit 4?"

A. We have got the most of them yet.

Q. 22. Have you sold any of them?

A. We have sold some of them.

Q. 23. You have them in stock, I suppose, and sell them when anybody wants them. Is that it?

A. Yes, sir.

121 Q. 24. In this lot mentioned in the bill, "Exhibit 4," there are two sets of lamp burners, one is a sixteen-wick burner and one a twenty-wick burner?

A. Yes, sir.

Q. 25. At what price do you sell the sixteen-wick burners?

A. We rarely sell a burner alone. We generally sell the fixtures with it.

Q. 26. You never sell the burners alone?

A. No, sir.

Q. 27. But you have to fix some price to them when you sell them, don't you?

A. Well, yes; we have a price, which would be from two dollars to two dollars and a half apiece for sixteen-wick burners.

Q. 28. And what is your price for twenty-wick burners?

A. About three dollars to three dollars and a half; something like that. We often get a special price on them. We don't hardly ever sell the burner.

Q. 29. Those burners are more expensive than the ordinary kind of burners, are they not?

A. Yes; they are a little more expensive, because there is duty and freight to pay on them, which makes them high.

Q. 30. And there is more work about them that about an ordinary burner, is there not?

A. Oh, I don't know. We have burners here that are coming pretty high.

Q. 31. Well, take the ordinary lamp burner?

A. Yes; there is more work about them than an ordinary burner.

Q. 32. Naturally, then, they would be higher in price than the ordinary burner, wouldn't they?

A. Yes, sir.

Q. 33. Do you sell these twenty and sixteen wick burners cheaper than Mr. Graff sells his?

A. I don't know how he sells his.

Q. 34. This lamp burner, "Exhibit C," is a twenty-wick burner, isn't it?

A. Yes, sir.

Q. 35. How much did you sell this burner, "Exhibit C," to Mr. Steele for?

(Question objected to by respondents as not cross-examination, and withdrawn.)

Q. 36. Did you get this burner, "Exhibit C," in the last bill of lading or did you have that before, do you know?

122 A. I don't know. I don't know how long that burner has been in Mr. Miller's hands?

Q. 37. Do you know this man you have spoken of, Mr. W. H. Hecht?

A. No, sir.

Q. 38. You don't know him personally?

A. No, sir.

Q. 39. Does Mr. Boesch know him personally?

A. I suppose so.

Q. 40. You are a German yourself, are you not?

A. Yes.

Q. 41. Did you come from Berlin?

A. No, sir.

Q. 42. From another portion of Germany?

A. Yes, sir.

Q. 43. Did you find or do you find much call for these Mitrailleuse burners?

(Question objected to by respondents as not proper cross-examination.)

A. Well, no; not much.

Q. 44. Do you consider them any better than any other burners that you sell?

(The same objection by respondents.)

A. That is a matter of taste. There are some other burners that are almost as good as them. Of course, there are coal-oil burners now that give a better light than those do.

Q. 45. You call these the "Diamond burner," do you not?

A. Yes; "Diamond" or "Mitrailleuse."

Q. 46. Do you sell any burners other than these "Diamond" or "Mitrailleuse" burners that are as good as they are?

A. Yes.

Q. 47. What kind of burners are those?

A. The "Metraleuse," which is the same thing.

Q. 48. No; I say any other kind?

A. We sell one that is almost as good, but it is not the "Metraluse."

Q. 49. Which one is that?

A. It is the "Robert Argand."

Q. 50. Do you have much sale for them?

A. Well, probably we could have, but we don't try to force them. We use them in our lamps.

Q. 51. Are they as expensive as the Metraluse burner?

A. They are fully as expensive as the small ones are, but not quite as expensive as the large ones are, but they give almost as much light as they do.

123 Q. 52. They are not as expensive as these large Metraluse burners, you say?

A. No, sir.

Q. 53. But the small ones are?

A. Yes, sir.

Q. 54. Where do you sell these "Diamond" burners, in the city or in the country; where do your orders come from?

A. Wherever we have calls for them.

Q. 55. From where do you have calls for them?

(Question objected to by respondents as not proper cross-examination.)

A. If anybody comes in to buy a burner, I don't know where they go, whether they go into the country or not.

Q. 56. Well, but do you receive orders from the country.

(The same objection by respondents.)

A. Well, I don't know that we ever did receive any orders from the country.

Mr. Boone: We make the further objection that the witness has already testified in regard to the same matter in his former examination.

Q. 57. Then you receive your orders from the city, do you?

A. When anybody comes to buy those burners I don't know where they go to. The persons to whom we sell are generally persons that come into our place and get them and take them away.

Q. 58. Is it not a fact that the price of your burners is less than

the price at which Mr. Graff sells his burners of a corresponding size?

(Question objected to by respondents as immaterial and not proper cross-examination.)

A. Well, I couldn't tell you, because I don't know his price. I don't know what the price of Mr. Graff's burners is.

Q. 59. Have you any fixed price for sixteen-wick Metraluse burners in your shop?

(The same objections by respondents.)

A. As I say, it is two or two and a half dollars, I am not sure which.

Q. 60. Either one or the other; either two or two and a half dollars?

A. Yes, sir.

Q. 61. And what is the price of the twenty-wick burner?

(The same objections by respondents.)

124 A. About three or three dollars and a half, I believe.

Q. 62. Do you mean that you sometimes sell at three dollars and sometimes at three dollars and a half?

(The same objection by respondents.)

A. We sometimes sell them at three dollars and sometimes at three dollars and a half. We don't never sell a burner alone, but it always goes with some fixtures with it.

(By Mr. BOONE:)

Q. 63. Is there any particular demand for that kind of burner?

A. No, sir; not as I can tell.

Q. 64. You keep this kind of burner in your stock amongst all the other kinds of burners you have, do you not?

A. Yes, sir.

Q. 65. You have a great many kinds of burners in your place, do you?

A. Yes, sir.

Q. 66. What kind of a business do you do; do you do an advertising business and send out agents or solicitors over the State?

A. No, sir.

Q. 67. You sell simply from your shop?

A. Yes, sir.

Q. 68. That is, people come in there and look around and buy what they see that they want?

A. Yes, sir.

Q. 69. In fact, yours is a manufacturing establishment principally, isn't it?

A. Yes, sir.

(By agreement of counsel for the respective parties herein the time within which testimony may be taken herein is extended to and including the first day of July, 1887.)

(Examination continued in conformity with agreement of counsel, subject to agreement and notice.)

125 THURSDAY, *May 12th*, 1887.

Present: Mr. Miller, of counsel for complainant; Mr. Boone, of counsel for respondent.

Deposition of Albert Graff.

Examination-in-chief of ALBERT GRAFF resumed on behalf of respondents (by Mr. BOONE):

Q. 19. At our last sitting here you stated that you had a contract with Schwintzer & Graff, did you not?

A. Yes, sir.

Q. 20. And you stated that you would produce that contract, did you not?

A. It is not a regular contract. It is only pencil marks that I took from the contract which I made in Germany, which is contained in a travelling book or memorandum book which I carry with me. I was hunting a long time for it, and yesterday I found it and copied it off on this paper which I now produce. This paper is a copy of the memorandum of that contract which I have in my book.

Q. 21. You say this is a copy?

A. Yes, sir; a copy from my memorandum book.

Q. 22. Where is the original contract?

A. It is in Berlin, Germany. Mr. Schwintzer has it.

Q. 23. Did you have a copy of that original contract?

A. No, sir; I took only this which I have in my memorandum book.

Q. 24. Who made that copy in your memorandum book?

A. I made it myself.

Q. 25. When?

A. In 1885, when I was in Germany. The copy which I produce to-day I made yesterday from my memorandum book.

Q. 26. When was this contract made?

A. In 1885, about April.

Q. 27. The same time that the assignment was made?

A. The same time that the assignment from Mr. Schwintzer was made.

Q. 28. Yes; at the time you got that assignment this contract was entered into?

A. This contract was made one day later than the assignment was made.

Q. 29. This paper which you have offered reads as follows:

126 "Mr. Albert Graff binds himself to pay to Mr. Carl Schwintzer, instead of the — in the patent letters mentioned, one hundred dollars for the first year," etc. What is referred to by the words the — in the letters patent mentioned?"

A. That means the assignment.

Q. 30. This one hundred dollars referred to here in this first para-

graph of this paper refers to this one hundred dollars referred to in the assignment, does it?

A. Yes, sir.

Q. 31. And not to the letters patent themselves?

A. Yes, sir; that is so.

Q. 32. Then the intent and meaning of that paragraph is that instead of the one hundred dollars mentioned in the assignment you agreed to pay two hundred and fifty marks?

A. Two hundred and fifty marks the first year.

Q. 33. Yes; but this relates to a payment which is to be made in lieu of the payment stated in the assignment, does it not? That is, the consideration of two hundred and fifty marks, payable annually until a certain sum is paid, is in lieu of the one hundred dollars stated in the assignment, is it not?

A. Yes, sir.

Q. 34. And to that extent it changes the assignment, does it not?

A. Yes, sir.

Q. 35. Then this whole contract was made with reference to that assignment, was it not?

A. Yes, sir.

Q. 36. Referred to that assignment and the invention covered by the patent?

A. Yes, sir; for the part that belonged to Schwintzer.

Q. 37. Is this paper which you have to-day produced a full copy of the contract which was made between you and Carl Schwintzer?

A. That is the full contract.

Q. 38. Does it contain everything that is contained in the original document?

A. Yes, sir.

Q. 39. All the words and letters contained in the original contract?

A. Yes, sir.

Q. 40. Did the original contract bear date—do you know whether the original contract was dated or not?

A. I don't know whether it was or not.

127 Q. 41. Then you don't know whether the original contract was dated or not?

A. No, sir; sure it ought to be dated, but I don't know if it was.

Q. 42. Then you don't know whether this is a correct copy, do you, as it is not dated?

A. It is a correct copy, with, perhaps, the exception of the date.

Q. 43. What was the consideration to Mr. Schwintzer for this contract?

A. Four thousand marks.

Q. 44. You agreed to this contract to pay four thousand marks?

A. Yes, sir.

Q. 45. What for—what was the consideration for that four thousand marks?

A. It was instead of the one hundred dollars mentioned in the assignment.

Q. 46. Then the four thousand marks was for an interest in the

patent, was it not, which you purchased from Mr. Schwintzer; that money was to pay for that interest in the patent, was it not?

A. To pay four thousand marks in full for this patent instead of the one hundred dollars agreed on in the assignment; only this contract says I have the permission to pay in installments instead of paying all of it at one time.

Mr. BOONE: I object to that because the document shows for itself, and is the best evidence, and I move to strike out that answer because it is not responsive to the question.

(The copy of the contract produced by the witness, above referred to, is introduced in evidence by respondents and marked "Respondents' Exhibit 5.")

Q. 47. I believe you stated, when on examination before, that you had never manufactured any of these burners in America, did you not?

A. Yes, sir.

Mr. MILLER: I do not object to this document, "Exhibit 5," as being a copy, but I will object to it as I would to the original were it here, and to any and all other evidence in regard to the title to this patent, because no such defence has been pleaded as lack of title in this suit, and the evidence is therefore irrelevant to the issues.

(It is agreed that the document in the German language, "Respondents' Exhibit 1," shall be submitted to Henry Hasbach for translation, and that his translation of the same shall be accepted by both complainant and respondents, and that the translation, "Exhibit 2," heretofore introduced in evidence, shall be withdrawn and the translation of said Hasbach substituted in place thereof and marked "Respondents' Exhibit 2.")

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Cross-examination of ALBERT GRAFF (by Mr. MILLER):

Q. 1. What is that document you have in your hand?

A. It is the assignment from Carl Schwintzer to myself.

Q. 2. Look at the signatures at the end of the document and see.

A. It is the assignment from William Graff to myself.

Q. 3. Do you know William Graff's signature?

A. Yes, sir.

Q. 4. Is that his signature?

A. It is.

Mr. MILLER: I introduce in evidence this paper, which is an assignment of one-sixth interest in the letters patent herein from William Graff to Albert Graff, dated September 18th, 1884, and received for record in the United States Patent Office January 31st, 1885, marked "Complainant's Exhibit D."

Q. 5. How much did you pay for this assignment from your brother, William Graff?

A. For this I paid one hundred dollars.

Q. 6. Is that all?

A. Yes, sir.

Q. 7. What is this document which I now hand you?
A. It is an assignment from William Graff to myself for two twenty-fourths interest in the patent.
Q. 8. By whom is this signed?
A. It is signed by William Graff.
Q. 9. And who else?
A. Carl Schwintzer.
Q. 10. Do you know the signature of Carl Schwintzer?
A. Yes, sir.
Q. 11. And that of William Graff?
A. Yes, sir.
Q. 12. Are those their correct signatures?
A. Yes, sir.

Mr. MILLER: I introduce in evidence the assignment, last above referred to, of an undivided two twenty-fourths interest in the letters patent in controversy, dated April 22, 1885, and received for record in the United States Patent Office August 29th, 1885, marked "Complainant's Exhibit E."

Q. 13. Look at the signatures to this document which I
129 now hand you and see if you know those signatures.
A. Yes, sir; I do know them.
Q. 14. Are those the signatures of William Graff and Carl Schwintzer?
A. Yes, sir.

Mr. MILLER: I introduce in evidence the document last above referred to, being an assignment of an undivided six twenty-fourths interest in the letters patent in controversy from William Graff and Carl Schwintzer to Albert Graff, which assignment is dated April 22, 1885, and was received for record in the United States Patent Office August 29, 1885, marked "Complainant's Exhibit F."

Q. 15. How much did you agree to pay Mr. Schwintzer for his interest in the patent—the full amount you agreed to pay him?
A. Four thousand marks.
Q. 16. How many dollars is that?
A. It is a little less than one thousand dollars.
Q. 17. This contract, "Exhibit 5," says: "For the first year the sum of two hundred and fifty marks, payable on the first of February, 1886, and each following year"——

Mr. BOONE (interrupting): I object to the question as incompetent and not the best evidence. The contract shows for itself.

(By Mr. MILLER:)

Q. 18. This contract says you agreed to pay him two hundred and fifty marks for the first year, payable on the first of February, 1886, and each following year on the same date the sum of five hundred marks until the amount of four thousand marks are paid in all. Did you pay him the two hundred and fifty marks for the first year?

A. Yes, sir.

Q. 19. How much did you pay him after that, each following year? —. ——.

(By Mr. BOONE:)

Q. Have you any receipts showing payments?

A. No, sir.

(By Mr. MILLER:)

Q. 20. How much did you pay him after that?

A. Five hundred marks last year.

Q. 21. How much have you paid him this year?

A. I paid him the balance of the four thousand marks.

130 Q. 22. How much have you paid him in all, then?

A. Four thousand marks.

Q. 23. Then you paid all the money called for by this contract, did you?

A. Yes, sir.

Q. 24. Why didn't you get a better copy of this contract than a mere memorandum in your book at the time?

A. He had a contract and I signed my name, and it was only a money matter.

Q. 25. Did you ask him for a copy of that contract?

A. Only in so far as I could take a copy in my memorandum book.

Q. 26. Where was that?

A. It was in Berlin in 1885.

Q. 27. You then took a copy in your memorandum book which you produced here?

A. Yes, sir.

Q. 28. Then this document, "Exhibit 5," is a copy of the copy in your memorandum book, is it?

A. It is.

Q. 29. In your direct examination, in answer to question six by Mr. Boone, you stated, "I gave my brother a royalty every year of one hundred and fifty dollars on that seven-sixteenths." Is that royalty which you referred to in that answer the agreement specified in this contract, "Exhibit 5?"

A. I made a mistake in using the word "royalty" instead of the word "installment." When I said "royalty" I meant "installment." It was not exactly an installment, but a part payment.

Q. 30. Was that an installment mentioned in this contract of two hundred and fifty marks the first year and five hundred marks each year afterwards?

A. Yes, sir.

Q. 31. Is that what you referred to when you spoke the word "royalty" in your answer to question 6 on direct examination?

A. Yes, sir.

Q. 32. You say you did not manufacture these burners, but that you imported them from Germany, I understand?

A. Yes, sir.
Q. 33. How much do you sell the twenty-wick burners for?
A. We retail them at five dollars each.
Q. 34. And how much do you sell the sixteen-wick burners for?
A. Now it is three dollars and a half, but formerly we charged four dollars for them.
131 Q. 35. What did you formerly charge for the twenty-wick burners?
A. Six dollars.
Q. 36. When did you charge six dollars for them?
A. Until last fall—last year.
Q. 37. And when did you charge four dollars for the sixteen-wick burners; when did you charge from four dollars to three dollars and a half?
A. Last fall, shortly after this suit was commenced.
Q. 38. Why did you reduce the price?
A. Because I was undersold by others.
Q. 39. By whom?
A. By the defendants herein.

Re-examination of ALBERT GRAFF (by Mr. BOONE):

Q. 1. Did Mr. Miller tell you that you had used the word "royalty" wrongly after you had testified here?
A. No, sir; I looked in the directory and I couldn't find the word.
Q. 2. Who first called your attention to the fact that you had used the word "royalty" here?
A. I knew myself that I didn't use exactly the right word.
Q. 3. That is not the question. Answer my question. Who first called your attention to the fact that you had used the word "royalty" wrongly in this case?
A. There was my wife sitting here when I said it, and she called my attention to it.
Q. 4. Who told you first that you used the word "royalty" wrongly?
A. My wife.
Q. 5. Did Mr. Miller talk with you any about it?
A. No, sir.
Q. 6. So you didn't know from any other source than from your wife that you had used the word wrongly?
A. No, sir.
Q. 7. When did you make the first payment on that contract?
A. The first payment was made the second of January, 1886.
Q. 8. How much did you pay then?

Mr. MILLER: I object to the question on the ground that it is not re-examination.

132 A. Two hundred and fifty marks.
Q. 9. When did you make the second payment?

(The same objection by complainant.)

A. That I don't know exactly.

Q. 10. Have you got any memorandum of the date when you made that second payment?

A. No, sir.

Q. 11. Did you get any receipt from your brother for that money?

A. No, sir; he said that he received the money that I sent him in a letter.

Q. 12. Where is that letter?

A. I haven't got it.

Q. 13. Where is it?

A. I don't know. I will have to look my letters over.

Q. 14. Have you got that letter in your possession?

A. I don't exactly know.

Q. 15. Did you ever have in your possession a letter stating that your brother had received the second installment which you paid?

A. Yes, sir; he answered me that he received the money; but if I have that letter still I don't know.

Q. 16. How many installments have you paid altogether?

A. Four.

Q. 17. When did you make the third payment?

A. January or February of this year.

Q. 18. How much was it?

A. It was upwards of twelve hundred marks.

Q. 19. Did you get any receipt for that payment?

A. No, sir.

Q. 20. Did you ever get any notice or memorandum from your brother stating that he had received that money?

A. He would state in his letters that he received the money, but I never got a regular receipt.

Q. 21. Where are the letters in which he acknowledged the receipt of that money?

A. From the last payment? I haven't it yet.

Q. 22. Well, the third payment.

A. That I may have; I don't know.

Q. 23. You have the notification of the receipt of that payment, have you?

133 A. I don't know exactly; but I will look over my letters and see.

Q. 24. You don't know whether you have got it or not?

A. No, sir.

Q. 25. Do you keep your letters?

A. Not all of them.

Q. 26. Don't you keep your letters which acknowledge the receipt of money?

A. Some of them. I don't keep them regularly.

Q. 27. When did you make the last payment, or fourth payment?

A. This year; the second of May.

Q. 28. How much was that?

A. Two thousand marks.

Q. 29. How came you to make a payment of twelve hundred marks in one payment and two thousand marks in another pay-

ment when your contract simply bound you to pay two hundred and fifty marks a year?

A. The contract says not less than that, but not more.

Q. 30. How came you to pay such large sums, then, in preference to two hundred and fifty marks a year?

A. Ten days later or twelve days later—it was on the second of May—I thought, as I had the money, I would pay the whole amount. I sent this money out with instructions that it be sent on the bank in Berlin—the corresponding bank—and to pay the bill in full, certified by a magistrate that it will be legal for the court here; and that is the reason I paid the whole money in full.

Q. 31. Who instructed you to pay the money in full?

Mr. MILLER: I object to the question and instruct the witness not to answer the question on the ground that it is incompetent, immaterial, and irrelevant.

A. Under the instruction of counsel I decline to answer.

Q. 32. Did anybody instruct you to pay the money in full?

A. No, sir; I even asked Mr. Miller and he wouldn't do it.

Mr. MILLER: I move to strike out the answer as not responsive and as irrelevant to the issues.

Q. 33. You say that after you used the term "royalty" here you found you had made a mistake?

A. Yes, sir.

Q. 34. And then you thought you would pay it up in full?

A. Yes, sir.

134 Q. 35. Then that payment was made since the last session of this examination?

Mr. MILLER: I object on the ground that the court will take judicial notice of such things as that.

A. Yes, sir; it was made on the second of May.

Q. 36. Through what means of transferring money did you send those payments to your brother?

A. Generally I sent them by check on the Anglo-California Bank and I gave the bank instructions.

Q. 37. What instructions?

Mr. MILLER: I object and instruct the witness not to answer the question.

Q. 38. By what means of transferring money did you send the third payment and interest on the last payment?

(Objected to by complainant as incompetent, irrelevant, and immaterial.)

A. By check on the Anglo-California Bank.

Q. 39. Has the check ever been returned to you?

(The same objection by complainant.)

Q. 40. Do you know whether or not that check has ever been honored?

(The same objection by complainant.)

Q. 41. Do you know whether or not your brother has ever drawn the money on the check?

A. No, sir.

Q. 42. Do you know whether he has ever received the last payment or not—the money on the last check?

A. No, sir; I do not.

Q. 43. The fact is that none of those checks have ever been returned to you, is it not?

A. None of them have ever been sent back to me.

Q. 44. You don't know as a matter of fact whether your brother has ever received or drawn the money on any of those checks, do you?

A. He stated in his letter that he received the money.

Q. 45. He stated in his letter that he received some of the first installments?

A. In relation to all the money I sent to him he stated in a letter that he received the money.

135 Q. 46. He didn't send you a letter in regard to the money you sent him last May, did he?

A. He couldn't have got it yet.

Q. 47. Then, in regard to the third payment, you don't know whether he has received that yet or not. You haven't got any letter of notification that he has received that money, have you—that which you sent him in January or February last?

A. No, sir.

Q. 48. Do you carry a bank account at the Anglo-California Bank?

A. Yes, sir.

Q. 49. Have you any memorandum from that bank showing that in February of this year you sent your brother twelve hundred marks, and that on the second of May of this year you sent him two thousand marks?

A. No, sir.

(By Mr. MILLER:)

Q. 50. What man did you have your dealings with in the Anglo-California Bank?

A. I don't know his name. It is the man who sends the checks off.

Q. 51. Does he speak German?

A. One of them speaks German.

Q. 52. Does this one that you sent the money through speak German?

A. One of them does.

Q. 53. You don't remember the name of the one you sent the money through?

A. No, sir; I don't remember his name.

Q. 54. You say you paid the money in checks. What do you mean by checks?

A. They made me a duplicate check and I sent it off in a letter.
Q. 55. Who made out the check?
A. The man at the Anglo-California Bank at the counter.
Q. 56. And you sent it off?
A. Yes, sir.
Q. 57. It was what is called a draft, wasn't it?
A. Yes, sir.
Q. 58. And you sent that draft on?
A. Yes, sir.

(By agreement of counsel for the respective parties herein the time within which testimony may be taken herein is extended to and including the 11th day of July, 1887.)
(Examination continued in conformity with agreement of counsel, subject to agreement and notice.)

136 TUESDAY, *August 11th*, 1887—afternoon.

Present: Mr. Miller, of counsel for complainant; Mr. Boone, of counsel for respondents.

Examination-in-chief of ALBERT GRAFF on behalf of respondents (by Mr. BOONE):

Q. 1. You have been sworn in this case, Mr. Graff?
A. Yes, sir.
Q. 2. I believe you stated in your testimony here in this case taken heretofore that you had lived in this State a number of years, didn't you?
A. Yes, sir.
Q. 3. How many years?
A. Twelve years.
Q. 4. What year did you come here?
A. I came here in 1872, and then I went to New York and came back here again.
Q. 5. When did you come back?
A. I came back here the last time in 1873 or 1874.
Q. 6. And have been here ever since?
A. Yes, sir.
Q. 7. I believe you stated that you were in the employ of Mr. Boesch, one of the respondents in this case, for awhile, didn't you?
A. Yes, sir; I worked for him.
Q. 8. About when did you first go into his employ?
A. Well, it must be about six or seven or eight years ago. I have worked for him more than a dozen times. Sometimes I worked for a day and sometimes a week. I couldn't state exactly the date, because I worked so often there.
Q. 9. Approximate the first time.
A. Perhaps the first time was eight years ago.
Q. 10. That would go back to about 1879?
A. Yes, sir; something like that.

Q. 11. You say you worked off and on for him after that at times?

A. Yes, sir.

137 Q. 12. When did you last work for him?

A. The last time I worked for him must have been in 1881 or 1880.

Q. 13. Can you tell us exactly when it was? What did you do when you left his employ the last time?

A. I worked in some other shops, because at this time I worked in half a dozen shops.

Q. 14. When did you start into business yourself?

A. I started in my shop about 1880 or 1881.

Q. 15. Can't you tell me when it was—whether it was 1880 or 1881?

A. I don't know exactly the year. I started my store in March, 1882, and I started my shop about a year before that time.

Q. 16. Can you state the exact date when you started your shop?

A. Yes, sir. I opened my shop on the 20th of April, 1880. I ascertain that fact from a receipt for rent which I now hold in my hand.

Q. 17. Where was your shop at that time?

A. At 51 Fremont street.

Q. 18. That was the first shop you opened?

A. Yes, sir.

Q. 19. How long did you remain there?

A. I am there still.

Q. 20. You have been there ever since?

A. Yes, sir.

Q. 21. When did you receive the first burner from your brother in Germany—a burner of this class—a Mitrailleuse burner?

Mr. MILLER: I object to the question on the ground that it is irrelevant, incompetent, and immaterial.

A. October, 1881. I received only one burner with lots of other things.

Q. 22. Where were you then located?

A. I had a private room on Howard street; at least, I didn't have a store. I opened the store on the 15th of March, 1882.

Q. 23. That was the first burner, you say, you ever received from him?

A. Yes, sir; that was the first one I received and it was the first one I ever saw.

Q. 24. How many burners were there in that shipment?

A. Only one for a sample.

138 Q. 25. What did you do with it?

A. At this time I didn't do nothing with it. I left it lay until I opened the store. I wrote to my brother for samples of articles to manufacture in my shop and he sent me that burner among the other things.

Q. 26. Did you exhibit that sample to anybody?

A. No, sir; I didn't show it to anybody until after I opened my store.

Q. 27. Did you test it?

A. No, sir; I couldn't test it until the next lot.

Q. 28. You didn't test it?

A. No, sir.

Q. 29. Never tested it until you got the second lot?

A. No, sir.

Q. 30. How did you know it was a good one without testing it?

A. The particular construction.

Mr. MILLER: I object to that as immaterial, inasmuch as there is no pleading here attacking the validity of the patent.

Q. 31. You then sent an order for a number of these burners without testing the sample?

A. Oh, yes.

Q. 32. You didn't know whether it was a good burner or not?

A. Oh, yes; at this time I tested it and gave it to a practical tinsmith by the name of Klinger. I hadn't goods enough when I opened my store to fill my shelves and he let me have some goods, and I gave him this burner and he tested it.

Q. 33. When was that?

A. That was the end of March or the commencement of April, 1882.

Cross-examination of ALBERT GRAFF (by Mr. MILLER):

Q. 1. Do these burners require chimneys different from other lamps?

A. Yes, sir; particular chimneys.

Q. 2. You have to have special chimneys for that burner?

A. Yes, sir.

Q. 3. Did any chimneys come with that burner?

A. We tried to put a student's chimney on it.

Q. 4. Would it work with a student's chimney?

139 A. Yes, sir; it works.

Q. 5. I am speaking of this first burner you got in October, 1881.

A. Yes, sir; we tried it with a student's chimney.

Q. 6. When was it you first showed the burner to Klinger?

A. It was about two or three weeks after I opened my store—when he loaned me the goods—it was in March, 1882.

Q. 7. That was the time you showed the burner to Klinger?

A. Yes, sir.

Q. 8. Did I understand you to say that he took it and experimented with it?

A. Yes, sir; he took it and experimented with it, and he tried to make some coal-oil stoves after the same pattern.

Q. 9. How long did you use this first burner that was sent over to you?

A. I didn't use it at all, because Klinger keeps it.

Q. 10. Before you gave it to Klinger?

A. I had it lay[illegible]ring there as a sample.
Q. 11. You sp[illegible]oke about putting a chimney on it.
A. Yes, sir; b[illegible]ut not before I gave it to Klinger, and then he tried it and put on a [illegible] stud[illegible]'s chimney.
Q. 12. Betwe[illegible]en the time you got it in October, 1881, and the time you gave it to Klinger in March, 1882, what did you do with that one burner?
A. I didn't do nothing with it. I had it lying in a drawer there.
Q. 13. Whe[illegible]n was it that you tried the student's chimney on it?
A. It must h[illegible]ave been either March or April, 1882.
Q. 14. Then you didn't use it between October, 1881, and March, 1882?
A. No, sir.
Q. 15. And it was after March, 1882, that you commenced to use it and test it?
A. Yes, sir.
Q. 16. And g[illegible]ve it to Klinger?
A. Yes, sir; a[illegible]nd after that I opened the store there.
Q. 17. How did you happen to get this one burner that you speak of in October—wh[illegible]ere did you get it from?
A. From Berlin, Germany.
Q. 18. From who[illegible]m?
A. From Schwintzer & Graff.
Q. 19. How did you happen to get that from them?
140 A. I sent to my brother to send me some new things to put in my shop.
Q. 20. What did he do in answer to that letter?
A. He sent me lots of little things that he thought was good for here—samples of ink stands, card receivers, and different things—and this burner was among them.
Q. 21. And that is how you happened to get this one burner?
A. Yes, sir.

(By Mr. BOONE:)

Q. 22. You simply left that burner lying in your shop between the time you got it and the time you gave it to Klinger?
A. I had it at home before I started the store.
Q. 23. You didn't have it in your shop at all?
A. No, sir; I think not. No, sir.

Deposition of Martin Bauer.

Re-examination of MARTIN BAUER on behalf of respondents (by Mr. BOONE):

Q. 1. What were you doing in 1880?
A. I was working for Mr. Boesch.
Q. 2. Did you know Mr. Graff at that time?
A. Yes, sir.
Q. 3. What was he doing at that time?

A. Well, he was working in the shop for Mr. Boesch, the same as I did, but not steady.

Q. 4. Did Mr. Graff ever exhibit to you a sample of one of these Mitrailleuse burners about that time; and, if so, when?

Mr. MILLER: I object to that on the ground that it is irrelevant, incompetent, and immaterial; and on the further ground that no pleading has been filed by the defendants in this case attacking the validity of this patent in any way, shape, or form whatever.

A. Well, I know Mr. Graff was working in the shop for Mr. Boesch, and he asked me one time to come down with him to his shop. He had his shop started already by that time; and after quitting time one evening we went down to his shop and he showed me that first sample burner.

Q. 5. When was that?

A. That must be in 1881.

Q. 6. What time in 1881?

141 A. Well, I think it must have been the beginning of the year.

Q. 7. What makes you think it was the beginning of the year?

A. Well, the last time I know of Mr. Graff's working in our shop was in March, 1881.

Q. 8. Did he have a shop at that time?

A. Yes, sir.

Q. 9. Where was his shop at that time?

A. The same place where it is now.

Q. 10. Was he working for Mr. Boesch at the time that he took you down and showed you the burner?

A. Yes, sir.

Q. 11. What time did he leave Mr. Boesch's?

A. I think it was in March, 1881.

Q. 12. Then it was before March, 1881, was it, that he exhibited this burner to you?

A. Yes, sir.

Q. 13. In what condition was the burner then, Mr. Baurer?

A. Well, it was a regular Mitrailleuse burner. I couldn't exactly say it was exactly like it, but it was a Mitrailleuse burner.

Q. 14. Was the same kind of a burner as the complainants' model in evidence herein?

A. It was similar to it. I didn't pay much attention to it at that time. I only just knew that he had lots of those little things.

Q. 15. Can you say whether or not it had a cap on the top of it to support the tubes?

A. Well, I couldn't say.

Q. 16. Did you notice?

A. It had a ring around it.

Q. 17. You know that to be a fact, do you?

A. I think so, but I couldn't really say. It had a ring around on the top, but I don't know how it was on the top of it.

Cross-examination of MARTIN BAUER (by Mr. MILLER):

Q. 1. When was it that Mr. Graff showed you this burner?

A. It was one day after quitting time, and Mr. Graff worked up to March, 1881, for Mr. Boesch.

Q. 2. Now, when was it that he showed you the burner?

A. One night after we quit work.

142 Q. 3. Was it before March, 1881?

A. I should judge so.

Q. 4. Well, are you positive that it was; will you swear that it was?

A. Yes, sir.

Q. 5. You swear that it was before March, 1881?

A. It was after we quit work we went down, and as far as I could see in the books Mr. Graff worked up to March 25th, or something like that.

Q. 6. Is that the way you fix it, by your books?

A. That is the way I regulate it.

Q. 7. You have looked in the books, have you?

A. Yes, sir.

Q. 8. And you found on the books that Mr. Graff worked there in March, 1881?

A. Yes, sir.

Q. 9. And from that fact you swear that he showed the burner to you before that time?

A. Yes, sir; after we quit work we went down there together.

Q. 10. Where did he show it to you?

A. At Mr. Graff's shop.

Q. 11. Where was Mr. Graff's shop?

A. Where it is now.

Q. 12. Where is it now?

A. On Fremont street.

Q. 13. What number?

A. I don't know.

Q. 14. In what building?

A. The corner building. I don't know who it belongs to.

Q. 15. Was Mr. Graff running a shop there at that time?

A. Yes, sir.

Q. 16. And he didn't work at your shop any time after March, 1881?

A. No, sir.

Q. 17. Wasn't it March, 1882?

A. No, sir.

Q. 18. Did Mr. Graff have a store at that time?

A. I don't think so; I don't recollect.

Q. 19. Do you know whether the burner that he showed you had a flat cap on the top of it?

A. I didn't take any particular notice or pay any particular attention to it; I couldn't say.

Q. 20. Who else was there at the time?

A. I don't think there was anybody there; it was after quitting time.

A. Well, he was working in the shop for Mr. Boesch, the same as I did, but not steady.

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Q. 8. Did he have a shop at that time?

A. Yes, sir.

Q. 9. Where was his shop at that time?

A. The same place where it is now.

Q. 10. Was he working for Mr. Boesch at the time that he took you down and showed you the burner?

A. Yes, sir.

Q. 11. What time did he leave Mr. Boesch's?

A. I think it was in March, 1881.

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A. Yes, sir.

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Q. 6. Is that the way you fix it, by your books?

A. That is the way I regulate it.

Q. 7. You have looked in the books, have you?

A. Yes, sir.

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A. Where it is now.

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A. On Fremont street.

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Q. 14. In what building?

A. The corner building. I don't know who it belongs to.

Q. 15. Was Mr. Graff running a shop there at that time?

A. Yes, sir.

Q. 16. And he didn't work at your shop any time after March, 1881?

A. No, sir.

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A. No, sir.

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A. I don't think so; I don't recollect.

Q. 19. Do you know whether the burner that he showed you had a flat cap on the top of it?

A. I didn't take any particular notice or pay any particular attention to it; I couldn't say.

Q. 20. Who else was there at the time?

A. I don't think there was anybody there; it was after quitting time.

143 Q. 21. Was there anybody there besides you two?
A. No.
Q. 22. How did he come to show it to you; why did he show it to you?
A. I don't know; he showed it to me as a new burner.
Q. 23. Did he tell you anything about it?
A. Well, he just told me that he got it from Germany.
Q. 24. Did he tell you when he got it from Germany?
A. No, sir; he told me that he got it from his brother.
Q. 25. Did he say why he showed it to you?
A. No, sir.
Q. 26. Did he ask your opinion about it?
A. Well, I think he did.
Q. 27. What did he ask you about it?
A. What I thought about it.
Q. 28. What did you tell him?
A. I couldn't say nothing because I didn't know nothing about it.
Q. 29. Well, he took you down there to get your opinion, didn't he?
A. Well, I don't know that he did it just exactly for that, but just to come down and see his shop.
Q. 30. Did he tell you what he wanted you to go to his shop for or not?
A. Well, I don't know.

Deposition of Albert Graff.

Re-examination of ALBERT GRAFF on behalf of complainant (by Mr. MILLER):

Q. 1. Have you just heard Mr. Bauer's testimony in regard to your showing him a burner?
A. Yes.
Q. 2. Now, as briefly as possible, explain how that was.
A. The time that I showed Mr. Bauer the burner was in the summer of 1882; I know positive.
Q. 3. How do you know positively that it was?
A. I was friends with Mr. Bauer, and as I commenced at his shop I asked him to an opinion about my work, as I had a big piece of brass work and I didn't know exactly how to hammer it out, and I asked Mr. Bauer, after quitting time, to come to my shop, and as it was very warm I know it must have been the summer of 1882.
Q. 4. Where was this piece of work you are talking about?
144 Where were you doing this piece of work you are talking about?
A. In my shop.
Q. 5. And when was it that you asked Mr. Bauer to come down there?
A. It must have been in the summer time of 1882. I know that for the reason that at the time I had a big lathe, and I know if I hadn't a big lathe I couldn't have done so big a piece of work.
Q. 6. You were doing this work on a big lathe?

A. Yes.

Q. 7. Were you working for Mr. Boesch then?

A. No, sir; I did not then. At that time I had commenced my little shop, but I didn't have enough work to keep me employed, and I sometimes worked for a day for Mr. Boesch.

Q. 8. When was the last time that you worked for Mr. Boesch?

A. It was about four months later than I started my shop.

Q. 9. Four months after you started your shop?

A. Yes.

Q. 10. When did you start your shop?

A. It was in April, 1880.

Q. 11. When was the first burner of this kind that you ever saw?

A. Just as I got the first sample, in October, 1881—the first sample from my brother.

Q. 12. Had you ever seen that kind of a burner before that?

A. No, sir.

Q. 13. That was the first one you had ever seen?

A. Yes.

Q. 14. Therefore you could not have shown that kind of a burner to Mr. Bauer before that time?

A. No, sir.

Q. 15. Mr. Bauer testified that you showed him that burner in March, 1881. What have you got to say about that? Is that true?

A. No, sir. At this time I had not the burner.

Q. 16. You hadn't seen the burner at that time?

A. No.

Q. 17. How do you know that it was in October, 1881, that you got that first burner?

A. I enquired the dates here in the custom-house—the dates when I received my goods from my brother—the first and second consignments from my brother.

Q. 18. Did they give you the dates when that came through
145 the custom-house?

A. The broker gave me the dates.

Q. 19. Who was the broker?

A. I had three brokers.

Q. 20. Who was this particular broker?

A. I don't know his name.

Q. 21. What broker did you get this information from?

A. I got it from Brunch & Wheeler.

Q. 22. What dates did he give you?

A. The first date that he gave me was October, 1881.

Q. 23. What did you get on that date through the custom-house?

A. I received these samples and the first burner.

Q. 24. Now, what was the next date?

A. The next date was 1882.

Q. 25. What did you get on that date?

A. I received one hundred dollars' worth of goods.

Q. 26. What kind of goods?

A. Burners and chimneys.

Q. 27. This kind that this suit is about?
A. Yes, sir. Klinger now has the first burner in his possession.

(Complainant introduces in evidence copy of a document in the German language, purporting to be the judgment-roll in the case of Schwintzer & Graff *vs.* Julius Eckel, in the second department (criminal) of the royal superior court of justice I, at Berlin, Germany, to which said copy is appended a certificate to the effect that said judgment was in full force on the 3rd of June, 1885, said certificate being signed by the clerk of said court, to which is appended the seal of said court, marked "Complainant's Exhibit G.")

(Complainant also introduces in evidence a translation of Complainant's Exhibit G, which was marked "Complainant's Exhibit H.")

(Complainant introduces in evidence copy, duly certified by the clerk of the circuit court of the United States, ninth circuit, district of California, of the judgment-roll in the case of Carl Schwintzer and Albert Graff *vs.* Emil Wangenheim, in said court, marked "Complainant's Exhibit I.")

(It is stipulated and agreed by and between counsel for the respective parties herein that the time within which testimony may be taken herein is extended to and including Monday, August 15th, 1887.)

146 (Examination continued, in conformity with agreement of counsel, until Monday, August 15th, 1887, at half past ten o'clock a. m.)

MONDAY, *August 15th*, 1887.

Present: Mr. Miller, of counsel for complainant; Mr. Boone, of counsel for respondents.

Deposition of Antoinette Graff.

Examination-in-chief of ANTOINETTE GRAFF on behalf of complainant (by Mr. MILLER):

Q. 1. What is your name?
A. My name is Antoinette Graff and I am the wife of the complainant, Albert Graff.
Q. 2. You and your husband live here in the city?
A. Yes, sir.
Q. 3. Where is your place of business?
A. 47 Second street is our store.
Q. 4. That is the last store which your husband has testified to in this case?
A. Yes, sir; that is the last store.
Q. 5. Do you have anything to do with the business?
A. I am all the time in the store.
Q. 6. What do you do in the store?
A. I attend to the customers, make out the bills, and keep the books.

Q. 7. That is, you assist your husband in carrying on the store there?

A. Yes, sir.

Q. 8. Are you familiar with the affairs connected with the store?

A. Yes, sir. I have all the bills and books in my hands.

Q. 9. Are you familiar with this "Diamond burner" which is the subject of this suit?

A. Yes, sir. I think I am the first one that saw it.

Q. 10. When did you see it?

A. I saw it when we got it out of the custom-house March 27th, 1882. It was in a little box. There was a lot of little articles, ink-stands, card receivers, and some varnish, and with this there — a little fount that the burner was in.

147 Q. 11. Was that the first time that you ever seen the burner?

A. Yes, sir.

Q. 12. How many were there?

A. Only one.

Q. 13. And that, you say, was received in March, 1882?

A. Yes, sir.

Q. 14. Had you any burners of that kind previous to that?

A. No, sir. I never had any burners of any kind at all; not this kind or any other; not that I knew of as coal-oil burners.

Q. 15. When did you and your husband open your store there where you are now?

A. We rented the store on the 15th of March, in 1882; but we didn't open the store until the latter part of March, because we were poor and didn't have any goods to put in there until a friend helped us out and put goods in there. My husband's brother sent these things to us. Then this "Diamond" burner—his brother writes us that it was a good burner, and that if we would take hold of it we could make money out of it.

Mr. BOONE: I want to enter an objection to this testimony as incompetent on the ground that under the Federal laws the wife is not competent to testify in favor of her husband or against him.

Q. 16. What business was your husband in before he opened the store?

A. He is a metal spinner by trade. He had a shop rented in Joshua Hendee's place, 51 Fremont street.

Q. 17. When did he open the store there?

A. He rented it in March, 1880, and moved in in April, 1880.

Q. 18. Did he sell any lamps?

A. No, sir; he just worked for customers; he worked for ship-chandlers and for silversmiths mostly.

Q. 19. And he didn't sell any goods until after he moved into his store on Second street?

A. No, sir.

Q. 20. Do you remember of his getting a bill of goods through the custom-house in October, 1881?

A. No, sir. He didn't get some goods through the custom-house then; he got some goods in October, 1881, from the Manhattan Brass Company—some plumbing balls, from New York.

Q. 21. How did they come?

148 A. They came by railroad. These things were got in March, 1882. That was our first importation from Germany, and they came by the steamer Colima; and I am sure of that, because I looked all the papers over.

Q. 22. And that was the first importation that you got from Germany?

A. Yes, sir.

Q. 23. I will ask you whether your husband manufactures any of these burners here?

A. No, sir; he does not.

Q. 24. Where does he get them from?

A. From his brother, or from the firm of Schwintzer & Graff, in Germany.

Q. 25. They all come from that source?

A. Yes, sir; they all come from that place.

Q. 26. Where was it that he bought the first stock of these lamps?

A. Well, I cannot remember well, but it must have been the later part of 1882 or in the beginning of 1883. They sent us burners without any chimneys, and we didn't have any sale for them until we ordered the burners with the chimneys.

Q. 27. What did you do with this one burner that you received in March, 1882?

A. Well, first there was so many little things, and being so much brass-work the chimney must have been broken, but I went and got a German style of stone burner, and to make it fit to burn I had to take out the button or center piece, and then we tried it and it gave a perfect white light. As his brother said we could make money out of that burner, we looked into it, and there came an old tinsmith, Mr. Klinger was his name, and my husband showed him this burner and asked him what he thought about it, and he said, "The construction of this burner is the best I have ever seen;" and he said, "I have worked in metal forty or forty-five years;" and he said, "If I was you I would take hold of it;" and then my husband wrote to his brother to send us fifty to try if he could sell them; and if he could sell them, then they would see what could be done about the patent. So of course he sent the burner and didn't send any chimney.

Q. 28. When was it that your husband's brother sent those fifty burners to him?

A. Well, I am not certain whether it was the latter part of 1882 or the beginning of 1883, but I think more it was 1883,

149 but I am not certain.

Q. 29. When did you sell the first burners of that kind that you sold?

A. We sold them at the fair. We took orders for them at the fair. My husband was there the first time in 1883, and we took orders for them.

Q. 30. What fair, the Mechanics' Fair?
A. Yes, sir; by that time we exhibited them there and sold some.

Mr. BOONE: I decline to examine the witness and move to strike out her testimony on the ground that it is incompetent.

Deposition of Albert Graff.

Re-examination of ALBERT GRAFF on behalf of complainant:

Mr. BOONE: I object to the further examination of this witness on the ground that he has been examined several times before.

Mr. MILLER: The object of the re-examination of this witness at this time is to correct the former testimony of the witness.

Mr. BOONE: Then, in that case I will withdraw the objection.

(By Mr. MILLER:)

Q. 1. You spoke of getting from Germany, in October, 1881, a lamp on your previous examination, and you stated that that was the first burner of that kind you had gotten, and then afterwards, in March, 1882, following, that you ordered a lot of them. Now, have you since your last examination looked at any of your books, papers, or records, or any other data, to refresh your memory in regard to those two facts?

A. Yes, sir.

Q. 2. What do you find?

A. With my broker I looked the custom-house records over.

Mr. BOONE: I object, unless the records are produced.

The WITNESS: We couldn't find nothing in October, but we found in March, 1882, a statement of goods received from Germany.

Q. 3. What was it, if anything, that you received in October, 1881, that you spoke of here the other day?

A. From New York we received some copper balls—some copper ware.

150 Q. 4. And those you received from New York in October, 1881, you say?

A. Yes, sir.

Q. 5. Then you were mistaken the other day in saying that you received a lamp burner in October, 1881?

A. Yes, sir; I was mistaken. We couldn't find nothing in the custom-house records.

Q. 6. When do you say, now, was the first time you received any of these lamp burners?

A. The first time was the 27th of March—the 25th or 27th of March—1882.

Q. 7. You hadn't received any prior to that time?

A. No, sir; and I never saw any before.

Cross-examination of ALBERT GRAFF (by Mr. BOONE):

Q. 1. Are you testifying from memory?

A. No, sir.

Q. 2. In October, 1881, you received a shipment of goods, did you, from where?

A. From New York.

Q. 3. How do you know that it was from New York?

A. I never got any other goods except from the copper ware.

Q. 4. Is that the only way you know it?

A. Yes, sir.

Q. 5. You did get some goods from Germany, didn't you?

A. Not before 1882.

Q. 6. How do you know you didn't get any before 1882?

A. I found it out in the custom-house.

Q. 7. Is that the only way you know it—that you found it out in the custom-house?

A. That is the only way.

Q. 8. When did you first receive a shipment of goods from Germany?

A. In March, 1882.

Q. 9. How do you know that?

A. I found out from the custom-house broker.

Q. 10. Is that the only way you know it?

151 A. Yes, sir; that is the only way I know it. I didn't keep any books at that time.

Mr. BOONE: I object to all this testimony as incompetent, and move to strike it out on the ground that it is hearsay testimony and not the testimony of the witness.

(It is admitted by complainant and respondents that the first entry upon the books of the custom-house of this port relating to the shipment of goods to complainant from Germany shows, as the date of the bill of lading of said goods January 21st, 1882.)

(Testimony closed.)

Examiner's Certificate.

I certify that the foregoing depositions were taken at the place stated in the caption to said depositions, at the several times set forth in said depositions, in my presence and in the presence of counsel for the respective parties to the cause in said caption entitled; that previous to giving his testimony each of the witnesses in said depositions named was by me duly sworn to tell the truth, the whole truth, and nothing but the truth in said cause; that said depositions were, except in so far as they were taken down in writing by the examiner, taken down in short-hand writing and transcribed by A. L. Coombs pursuant to stipulation and agreement of counsel; that said depositions after being so transcribed were read by or by me to the said witnesses and signed by them, respectively, except in those cases where such reading and signing were, by agreement of said counsel, waived, as in said depositions set forth, and that I have retained said depositions for the purpose of delivering the same with my own hand to the court for which they were taken.

Accompanying said depositions and forming part thereof are the

several exhibits introduced in connection therewith and referred to and specified therein. I further certify that I am not attorney nor of counsel for any of the parties to said cause, nor in any way interested in the event thereof.

152 In witness whereof I have hereunto set my hand this 15th day of August, A. D. 1887.

S. C. HOUGHTON,
Examiner in Chancery, U. S. Circuit Court, Dist. of Cal.

(Endorsed:) Opened by order — court & refiled August 19, 1887. L. S. B. Sawyer, clerk.

153 U. S. Circuit Court, Dist. of Cal.

GRAFF
v.
BOESCH. } No. 4107.

COMPLAINANT'S EXHIBIT E. S. C. H., Examiner.

Received for record Aug. 29, 1885, and recorded in Liber P. 33, page 56, of Transfers of Patents.

In testimony whereof I have caused the seal of the Patent Office to be hereunto affixed.

[SEAL.] W. N. MONTGOMERY,
Commissioner of Patents.

Ex'd: C. C. K.

Whereas letters patent of the United States No. 289,571, dated December 4th, 1883, were granted to Carl Schwintzer and Wilhelm Graff, of Berlin, Germany, assignors of one-half to J. F. Donnell & Co., of New York, for improvements in lamp burners (for which letters patent had previously been granted to them by the Government of Germany, No. 10621, dated November 14th, 1879, No. 10846, dated January 13th, 1880, and No. 11713, dated March 26th, 1880); and whereas said Wilhelm Graff is now the joint owner with the said Carl Schwintzer of the undivided one-half interest in the said patent for, to, and in the United States; and whereas Albert Graff, of the city and county of San Francisco, State of California, is desirous of obtaining an interest therein and has made certain propositions which said Wilhelm Graff has accepted:

Now, therefore, in consideration of the sum of one hundred dollars and for other valuable considerations, the receipt of which is hereby acknowledged, I, the said Wilhelm Graff, have sold, assigned, and transferred, and by these presents do sell, assign, and transfer, unto the said Albert Graff the full, undivided two twenty-fourth part of all the right, title, and interest in and to the said invention and to the letters patent therefor aforesaid, and, further, with
154 full right and power to manufacture, make, vend, and sell the articles of manufacture protected by said letters patent, and the said undivided interest to be held and enjoyed by the said Albert Graff, for his own use and behalf and for the use and behalf

of his legal representatives, to the full end of the term for which said letters patent are or may be granted or extended, as fully and entirely as the same would have been held and enjoyed by me had this assignment and sale not been made.

In testimony whereof I have hereunto set my hand and affixed my seal, at Berlin, Germany, this twenty-second day of April, A. D. 1885.

CARL SCHWINTZER.
WILHELM GRAFF.

In the presence of—
B. ROI.
M. W. MOORE.

Consulate General of the United States of America, at the City of Berlin, in the Kingdom of Prussia, German Empire, } ss:

On this 22d day of April, in the year 1885, before me personally came Carl Schwintzer & Wilhelm Graff, to me known to be the individuals in and who executed the within instrument, and severally acknowledged that they executed the same for the purposes therein mentioned.

M. S. BREWER,
[SEAL.] *Consul General of the United States of America.*

(Endorsed:) Filed Aug. 19, 1887. L. S. B. Sawyer, clerk.

155 U. S. Circuit Court, Dist of Cal.

GRAFF
v.
BOESCH. } No. 4107.

COMPLAINANT'S EXHIBIT F. S. C. H., Examiner.

Received for record Aug. 29, 1885, and recorded in Liber P. 33, page 54, of Transfers of Patents.

In testimony whereof I have caused the seal of the Patent Office to be hereunto affixed.

[SEAL.] M. N. MONTGOMERY,
Commissioner of Patents.

Ex'd: C. C. K.

Whereas letters patent of the United States No. 289,571, dated December 4th, 1883, were granted to Carl Schwintzer and Wilhelm Graff, of Berlin, Germany, assignors of one-half to J. F. Donnell & Co., of New York, for improvements in lamp burners (for which letters patent had previously been granted to them by the Government of Germany, No. 10621, dated November 14, 1879; No. 10846, dated January 13th, 1880, and No. 11713, dated March 26th, 1880); and whereas said Wilhelm Graff is now the joint owner with the said Carl Schwintzer of the undivided one-half interest in the said patent for, to, and in the United States; and whereas Albert Graff, of the

city and county of San Francisco, State of California, is desirous of obtaining an interest therein and has made certain propositions which said Carl Schwintzer has accepted:

Now, therefore, in consideration of the sum of one hundred dollars and for other valuable considerations, the receipt of which is hereby acknowledged, I, the said Carl Schwintzer, have sold, assigned, and transferred, and by these presents do sell, assign, and transfer, unto the said Albert Graff the full, undivided six twenty-fourth part of all the right, title, and interest in and to the said invention and to the letters patent therefor aforesaid, and, further, with full right and power to manufacture, make, vend, and sell the articles of manufacture protected by said letters patent, the said undivided interest to be held and enjoyed by the said Albert Graff, for his own use and behalf and for the use and behalf of his legal representa-
156 tives, to the full end of the term for which said letters patent are or may be granted or extended as fully and entirely as the same would have been held and enjoyed by me had this assignment and sale not been made.

In testimony whereof I have hereunto set my hand and affixed my seal, at Berlin, Germany, this twenty-second day of April, A. D. 1885.

CARL SCHWINTZER.
WILHELM GRAFF.

In the presence of—
B. ROI.
M. W. MOORE.

Consulate General of the United States of America, at the City of Berlin, in the Kingdom of Prussia, German Empire, } *ss:*

On this 22d day of April, in the year 1885, before me personally came Carl Schwintzer & Wilhelm Graff, to me known to be the individuals described in and who executed the within instrument, and severally acknowledged that they executed the same for the purposes therein mentioned.

M. S. BREWER,
[SEAL.] *Consul General of the United States of America.*

(Endorsed:) Filed Aug. 19, 1887. L. S. B. Sawyer, clerk.

157 U. S. Circuit Court, Dist. of Cal.

GRAFF
v.
BOESCH. } No. 4107.

COMPLAINANT'S EXHIBIT H. S. C. H., Examiner.

Proof of Service by Mail.

This is to certify that the document hereto annexed, together with a duly authenticated copy thereof, has been delivered by order of the royal district attorney's office 1, at Berlin, enclosed in a letter, sealed with the official seal and addressed to Messrs. Schwintzer &

Graff, manufacturers of lamps, Sebasteaus Str., No. 18, to the receiver of post office No. 52, directing him to cause the service thereof upon it addressed by a mail carrier.

Berlin, June 19, 1885.

(Signed) WEINBERG,
Deputy Sheriff.

In the name of the king.

In the matter of the prosecution against the manufacturer of lamps, Julius Eckel, of Berlin, for infringement upon a patent right, the 2nd department (criminal) of the royal superior court of justice 1, at Berlin, in its session of February 5th, 1885.

Present—
1. Markstein, imp. c'rt councillor, presiding.
2. Bartisins, dist. c'rt councillor.
3. V. Makomaski, sup. c'rt councillor.
4. Count V. Strachuritz, } Imp. c'rt justices.
5. Hedeman, }

Judges.

Dr. Otto, district attorney, for the prosecution.
Dr. Behrens, referendary, clerk of county.

158 It was adjudged, ordered, and decreed that the defendant, the manufacturer of lamp burners, Julius Eckel, born at Berlin March 19, 1844—by religion, Protestant—and heretofore not punished, has been found guilty of violation of the patent laws, and therefore sentenced to pay the costs of court and a fine of 200 marks, and in the event of his failure to pay said fine that he be imprisoned one day for each ten marks of said penalty; also that the complainants, the lamp manufacturers, Schwintzer & Graeff, at Berlin, be authorized, within four weeks after due service of an authenticated copy of the judgment, to public once and at the defendant's expense the verdict of this court in the "Illustrated Journal for Tin and Terne Industry," at Stuttgart; also empowering them to take possession of the "Mitrailleuse burners" under seizure herein.

The court finds as follows:

The lamp manufacturers, Schwintzer & Graeff, at Berlin, have obtained from the imperial patent office letters patent No. 10621, dated Nov. 14, 1879, upon a "flat cap or covering of the intermediate spaces between the wick tubes" of "Mitrailleuse burners." Deviating from the construction heretofore in use on such burners, the novelty of the patented "Mitrailleuse burners" consists therein that the spaces between the single wick tubes are covered, and that regarding the cleaning of the burner as well as also the lighting power of those lamps special advantages are offered, which are more particularly described and set forth in letters patent No. 10621 issued August 21, 1880. The defendant, for a number of years and up to September 6th, 1884, has been employed as foreman in the factory of said firm; he has, as by him admitted, enjoyed the full confidence of the firms and been entrusted by them and in their behalf with

the work of improving upon and constructing new lamps and burners. As also appears from the testimony of Graeff, one of the partners of the firm, he has likewise assisted in the construction of the burner patented and here in question. Graeff had considered a closer connection of the single tubes of the "Mitrailleuse burner" more practical, and, upon his request, the defendant had experimented upon the said construction, first at the workshop of the factory; afterwards, however, in his private residence, which was situate within the enclosure of the factory grounds, until, finally and as a result of these experiments, the new lamp burner in its present form was constructed.

159 Having left the employ of Schwintzer & Graeff in September, 1884, the defendant established himself as manufacturer of burners & lamps, and immediately thereafter commenced the manufacture and sale particularly and in close imitation of the same "Mitrailleuse burners, with a flat cap or covering of the intermediate spaces between the wick tubes," which the firm of Schwintzer and Graeff manufacture by virtue of their patent right. The defendant admits all this, especially, however, his full knowledge of the patent right of said firm.

Leaving aside his legal objection, which will be ruled upon hereafter, he denies the entire identity of the burners as manufactured by him with those patented. He maintains that, while the patent burners made by said firm are round in the innermost cavity of the cap or covering, those by him manufactured show a rifled surface in the interior of the cap or covering. Thereupon the court holds it having been proven by the expert testimony of Civil Engineer Pütsch and by ocular inspection that the difference as maintained by the defendant is wholly insignificant as to the purpose and usefulness of the burner, and at the utmost constitutes an "æsthetic," but in no way a "technical," difference.

It has therefore been fully established that the burners as manufactured by defendant are entirely identical with those patented. The defendant admits of having manufactured about 300 burners, of which he has sold 200 at the price of 2 to 3 marks each. The firm of Schwintzer & Graeff, having become cognizant of the action of defendant in the premises, tried in an amicable way to induce him to discontinue the manufacture as aforesaid, and only when this proved of no avail moved on the 25th of October, 1884, the royal district attorney's office to prosecute him.

The foregoing is based upon the proofs adduced, especially, however, upon the admissions of defendant himself and the testimony of the witnesses and the expert. The defendant made himself punishable by his said actions, and in pursuance of §§ 34, '4, '5 of the Imperial Patent Laws.

It has, furthermore, been established by his own admissions that he has regularly manufactured and sold to the trade the burners as patented by the firm of Schwintzer & Graeff; also that he

160 was fully aware of their patent rights. It has also been proven by competent testimony that his burners are wholly identical with those of the firm of Schwintzer & Graeff. Finally

there could be no reasonable doubt in this case that defendant, while manufacturing without the authorization of the firm of Schwintzer & Graeff, was fully aware that he infringed upon their patent right, and thereby knowingly and wilfully violated the patent laws.

The defendant denies the latter charge, referring to § 5 of the Imperial Patent Laws. He contends that he considered himself entitled to the manufacture of the burners as patented by Schwintzer & Graeff. He claims that he had, after various experiments, at last found a construction that answered all requirements; that he had applied one of these newly constructed burners to a lamp in his private residence and used the same prior to Christmas, 1878; consequently long before the application of Schwintzer & Graeff for letters patent had been filed. He therefore claims to belong to the category of persons referred to in sect. 1, § 5, E. C., and who are not affected by the patent laws. It may be true that the defendant has used the burner frequently in his private residence and prior to the application by the present owners for letters patent. It has been established by the testimony of witness Graeff that the defendant, on various occasions and in his capacity as foreman, obtained parts of lamps, etc., from the members of the firm to experiment with in his private residence. It does not appear strange that such happened in this case. Defendant had, however, been especially requested by the witness Graeff to submit to a test and experiment upon an improved construction of the said burners. It therefore answered fully the purpose that defendant did so in the manner by him described; but his industrial and mechanical exertions, which is very essential herein, were made at the request and by authority of his employers. Defendant at that time did certainly not think that his said exertions would ever benefit anybody else but his employers, who paid him his wages therefore. When Bray, the metal-worker who was employed in the same factory, saw the new burners at defendant's private residence it was clearly understood by and between them, as appears from Bray's testimony, that application for a patent on the said construction would be made by Schwintzer & Graeff.

161 The said § 5, sect. 1, E. C., as referred to, is therefore not applicable and does not warrant the independent use for a person's own purposes and interest. § 5, sect. 1, E. C.

Compare: "Dambach Patent Law, 1877," page 21—Motives to Patent Law of 251, 1877—has emanated from the conclusion that the terms of § 2, E. C., which exclude the granting of a patent right upon inventions—

(*a*) Already publicly described; and

(*b*) Upon inventions which have already openly been made use of in this country, would work a hardship upon such persons who have at the time of the application of the owner of letters patent not openly and notoriously made use of such invention.

By the terms of § 5, sect. 1, the rightful ownership in all cases of the latter kind shall be protected against the effects of a privilege subsequently granted. The supposition of a collision between at least two entitled parties is therefore always prevalent. Such collision does not exist between Schwintzer & Graeff, on the one side,

and the defendant, on the other side, because the latter must be considered as a part of the former, because he was their paid industrial organ, working for them and acting in their behalf. Defendant has performed for his employers only such work as was necessary in order to render the construction of practical value and make it appear a fit subject for obtaining a patent.

It is absolutely wrong *by* the part of the defendant to claim for himself the priority of the idea. It has been established by the testimony of the witness Graeff that he was the originator of the leading idea, which he caused the defendant to execute in practical form. Graeff explains this in a plausible manner by declaring that he is not a tinsmith and does not understand that trade.

Thus the right of one who claims to be more entitled and therefore demands protection cannot contend with the formal right of the owner of the letters patent. The defendant has, moreover, in a certain degree co-operated with his employers in obtaining the patent, while the making use of prior rights which he may have possessed has not been rendered futile through the patent. Setting aside the applicablity of § 5, sect. 1, E. C., it cannot be drawn into consideration upon what ground the defendant was
162 willing and able to claim a priority of the invention resp. the open and notorious use thereof, whereby the same became accessible to every other artisan. (§ 2, E. C.)

In both directions an examination by the court is excluded, as in either event a ground for the nullification of the letters patent would be found. (§§ 10, 27, E. C.) (Compare Decisions of the Imperial Court, vol. III, page 253.)

From the foregoing it appears that the declaration of defendant, whereby he claims to belong to the category of those mentioned in § 5, E. C., is not entitled to credence. It has been proven by competent testimony that the circumstances surrounding the preliminary work for obtaining letters patent by Schwintzer & Graeff were such that defendant could not entertain the least little doubt in the validity of the patent in question. The court also thinks it fully proven that he knew that he had only worked for Schwintzer & Graeff, and that in manufacturing the same burners he infringed upon their patent right. It is therefore fully established beyond a reasonable doubt—

That the defendant, at Berlin, in September and October, 1884, has knowingly and in violation of the terms of §§ 4, 5 of the Imperial Patent Laws, appropriated the use of an invention by manufacturing, without the authorization of the owners of the letters patent—Messrs. Schwintzer & Graeff, at Berlin—the object of their invention, namely, "the flat cap or covering of the intermediate spaces between the wick tubes of Mitrailleuse burners," No. 10621, and sold the same to the trade.

In determining the penalty imposed upon the defendant pursuant to §§ 3, 4, ff. 4, 5, of the Imperial Patent Law, and of §§ 29, 40 of the Imperial Penal Code, the defendant's previous good character, as well as the damage caused to the owners of the letters patent

by the actions of the defendant, who sold about 200 burners, of the value of 2 to 3 marks each, must be considered.

The fine herein imposed appears, therefore, adequate.

At the same time it is ordered, pursuant to § 40 of the Imperial Penal Code, that the "Mitrailleuse burners" under seizure, as having been instrumental in the wilful violation in question by the said defendant, be confiscated. The order referring to the right of publication herein by the complainants is made pursuant to § 35 of the Imperial Patent Law.

163 The settling of the accrued costs herein is regulated by § 497 of the Code of Criminal Procedure.

(Signed) MARKSTEIN.
BARTISIUS.
v. MAKOMASKI.
COUNT STRACHWRITZ.
HEDEMANN.

The foregoing judgment is hereby attested to be, by virtue of the papers on file, in full force.

Berlin, June 3rd, 1885.

[Seal of the Royal Superior Court.]

DRIESEL,
Clerk of the IId Criminal D'p'tm'ts of the Royal Superior Court, I.

To Messrs. Schwintzer & Graeff, manufacturers of lamps:

The above signature of the clerk of the IId criminal dep'tm't of the royal superior court I, at Berlin, Driesel, is hereby attested.

Berlin, June 29, 1886.

[Seal of the Royal Superior Court.]

THE PRESIDENT OF THE ROYAL SUPERIOR COURT I,
By JUNGHANN,
Justice & Director of Superior Court I, G. 6760.

Here follows the acknowledgement of Hon. F. Raine, consul general of the U. S. of America at Berlin.

STATE OF CALIFORNIA,
City and County of San Francisco, } *ss:*

Henry Hasbash, being duly sworn, deposes and says that he is a citizen of the U. S. of America and conversant with the English and German languages; that he has made the foregoing translation into English from the German original, and that the same is true and correct in all its particulars as far as the heterogeneousness of the said two idioms permits.

HENRY HASBACH.

164 Subscribed and sworn to before me this 9th day of August, 1886.

[SEAL.] ALFRED A. ENQUIST,
Notary Public.

(Endorsed:) Filed Aug. 19, 1887. L. S. B. Sawyer, clerk.

165 U. S. Circuit Court, Dist. of Cal.

GRAFF
v.
BOESCH. } No. 4107.

COMPLAINANT'S EXHIBIT I. S. C. H., Examiner.

UNITED STATES OF AMERICA:

Circuit Court of the United States, Ninth Circuit, District of California.

Certified Copy of Judgment.

CARL SCHWINTZER *et al.*
vs.
AMIEL WANGENHEIM *et al.* } No. 3556.

In this action the defendants, Amiel Wangenheim and Samuel Sternheim, having been regularly served with process and having failed to appear and answer the plaintiffs' complaint herein, the legal time for answering having expired, and the default of the said defendants in the premises having been duly entered, according to law, and the court having, upon motion of Bishop & Watt, Esqs., counsel for plaintiffs, ordered that judgment be entered herein in favor of plaintiffs and against the said defendants for the sum of one dollar damages and for the costs of the action:

Now, therefore, by virtue of the law and by reason of the premises, it is considered by the court that Carl Schwintzer, Wilhelm Gräff, J. F. Donnell, and Albert Gräff, said plaintiffs, do have and recover of and from Amiel Wangenheim and Samuel Sternheim, said defendants, the sum of one dollar and their costs in this behalf expended, taxed at twenty-six $\frac{85}{100}$ dollars.

Judgment entered March 11, 1885.

(Signed) L. S. B. SAWYER, *Clerk.*

166 I hereby certify that the foregoing is a full, true, and correct copy of an original judgment entered in the above-entitled cause.

Attest my hand and the seal of said circuit court this 12th day of March, A. D. 1885.

[SEAL.] L. S. B. SAWYER, *Clerk,*
By F. D. MONCKTON, *Deputy Clerk.*

Endorsed: Filed Aug. 19, 1887. L. S. B. Sawyer, clerk.

167 U. S. Circuit Court, Dist. of Cal.

GRAFF
vs.
BOESCH. } No. 4107.

RESPONDENT'S EXHIBIT 2. S. C. H., Examiner.

In the name of the King.

In the penal case against Wilhelm Herrmann Hecht, turner and lamp-maker, in Steghtz. In infringement of the patent law has the first chamber of the royal state court at Berlin in the session of March, 1882, in which have taken part—

1. Fleishmann, justice of the State, as judge.
2. Kandelhardt, " " " "
3. Bransewetter, " " " "
4. Pawlitzky, " " " "
5. Leuschner, general assessor.

Foren, gen. assessor, as attorney of the State; Kromcki, reporter, as clerk of the court.

Be it known that the defendant, W. H. Hecht, turner and lamp-maker, born in Cottbus the 13th day of January, 1837, — not guilty of infringement of the patent law, the cost of procedure to be charged to the state treasury.

Proofs.

The lamp-makers, Schwintzer and Graff, of this place, Berlin, had a patent on the 13th day of November, 1879, by the imperial patent office for a flat cover on Mitrailleuse burner, known by the No. of patent 10621, commencing the 14th day of November, 1879, which contains the claim:

Flat covering of the spaces between the tubes on Mitrailleuse burners.

The defendant tried also to get a patent on the 30th of March, 1880, on Mitrailleuse burners having the upper end of the wick tubes half enclosed, but was informed on the 12th day of Oct., 1880, that the half-enclosed wick tubes were already protected by the patent of Schwintzer & Graff.

Notwithstanding, the defendant sold on the 20th day of Dec., 1880, to the firm of Necke Springmann six burners of his make, in regard of which the firm of Schwintzer & Graff claim to be an infringement on their patent.

168 It appears *that* matters of facts by the letters patent, the official information of the imperial patent office of Oct. the 30th, 1880, the testimonies under oath of the lamp-maker Graff, and the confession of the defendant—

The injured ones have made the well-timed motion to punish; that the defendant, of the firm of Schwintzer & Graff, was instructed

to have the permission to make use of the patent matter. He does not affirm, he rather disputes, that his make of Mitrailleuse burners should be taken for an imitation of the patent one, in that it does really differ; then he asserts that if even such was the case he yet was protected by the German patent law No. 5; that he already before the filing of the questionable patent was engaged in establishing such Mitrailleuse burners, and particularly to the producing of his used apparatus (punches and dies), and finished according to his own ideas.

I.

The court has been convinced that the flat covering of the burners made by the defendant is really identical with the one of Schwintzer & Graff under No. 10621 patent invention.

On the Hecht burner is, as on the one of Schwintzer and Graff, a covering of the spaces between the wick tubes. This does not enclose the tubes all around, but only the outer sides of the burner, about to the half.

This caused the resemblance of both models in conformity with the information under oath of the imperial patent office of Oct. 30th, 1880, and the opinions under oath of the experts, Reetz and Wilop.

The supposed difference of both burners is no principle. The patent burner has for the chief object to prevent the accumulation of the dirt from wiping off the wicks and to give the same more strength. This same object is attained, only in an inferior proportion, by the Hecht burner.

Herein agree the informations of the imperial patent office of Oct. 30th, 1880, and opinions of Preetz and Wilop.

Wilop deposed that by the similarity — the means of the aim of the patent invention by the Hecht burner less good will be had. On the other hand, by the Hecht burner the flame will have a larger supply of air than the patent one. This seems, however, not to be an important difference and does not contradict the well-
169 expressed opinions of the imperial patent office and of Preetz that the resemblance of both burners is so great that the one looks to be an imitation of the other.

Schwintzer and Graff have applied for a patent of their invention on the 13th of Nov., 1879. The defendant's application for a patent of his burner was denied on the 12th Oct., 1880. He sold, in spite, six burners on the 30th Dec., 1880, to Neske & Springmann. As he knowingly used the patent invention, he should be punished in case he is not protected by the patent law # 5.

II.

The whole result of the taking of evidence brought the court to the conviction that the defendant already at the time of the application of the patentees had made use of the invention, or at least had made use of the necessary arrangements.

The contrary was indeed deposed by the witness Koppe. The same was formerly foreman of the defendant, and said that at the end of February or beginning of March, 1880, the defendant procured himself, through the manufacturer, Hugo Koeppen, one patent burner of Schwintzer and Graff, and after this model commenced making Mitrailleuse burners with a flat covering. Before he had not produced any, as well as his model, and used dies and punches for the production of such.

The witness Koeppen has proved that the defendant gave him on March 3rd, 1880, the order to get for him one patent burner. He, however, asserted that the defendant had before shown him one of his own-make Mitrailleuse burners with a flat covering, and told him he wanted to compare his burner with the patent one. The witness Hobermann, appointed by the commissary, who was working for the defendant until November, 1880, deposed of his remembering that Hecht already, in Nov., 1879—nearer he could not state the time—had made the first fittings, necessary tools, to the production of the flat covering of his Mitrailleuse burner, such as punches and dies.

The witness Schmidt deposed under oath that he had established for the defendant apparatus already in October, 1879, for the production of said burner.

Koeppen has agreed that these apparatus could not be used for another purpose than this: The defendant's burdened testimonies appeared to the other witnesses not authentic. The incredibility is still strengthened by the fact, as he himself admits, to be on bad terms with the defendant.

According to all, what the court considers as proofs is for once firmly founded on facts: That the defendant, in Berlin, after the 20th day of October, 1880, with reference to the subject of the invention, the flat covering of the space between the wick tubes of Mitrailleuse burners, of which the firm of Schwintzer and Graff was given a patent on the 14th day of November, 1879, wilfully, without permission of the patentees, made and brought into trade—

Numbers 34 and 4 of the Imperial Patent Law, dated May 25th, 1877; otherwise it is, however, further established on founded facts that the defendant already, before the 14th November, 1879—hence at the time of application of the patentees—has brought into use in the native country the doubtful invention, particularly to this had made the useful requisite arrangement, No. 4. On the contrary, he does not trespass the effect of the Schwintzer & Graff patent. He must accordingly be acquitted. The expense matter is designated to No. 499 imp. pat. office.

(Signed) FLEISHMANN.
KANDLEHARDT.
BRANSEWETTER.
LEUSCHNER.
LIDCHER,
Clerk of the Court of Criminal Chamber II.

Seal Attached of the Prussian State Court.

(*Power of Attorney.*)

The court testimonial and confirmation of my rights for the protection against Messrs. Schwintzer and Graff's invention patent, and the management of diamond burners, I surrender for the preservation of my rights to Mr. Emile Boesch.

Berlin, June 12th, 1886.

W. H. HECHT.

The above, his own hand signature, to me known and warranted, Mr. W. H. Hecht certified.

Berlin, 12th day of June, 1886.

[Seal District No. 121.] GERBER BEUHOLD.

2 stamps, of 2½ marks each, with seal of imperial court of magistrates.

Seen for the above signature and seal.

Berlin, June 29, 1886.

F. KAINE,
Consul General of the United States of America,
Berlin, German Empire.

171 U. S. Circuit Court, Dist. of Cal.

GRAFF
v.
BOESCH. } No. 4107.

RESPONDENT'S EXHIBIT 3. S. C. H., Examiner.

GERMAN EMPIRE,
Kingdom of Prussia, City of Berlin, } *ss:*

I, the undersigned, Wilhelm Herrmann Hecht, manufacturer of lamps, at the city of Berlin aforesaid, do hereby declare that as early as in the month of July, 1879, I was about to devise and make an improvement of a burner for petroleum lamps, consisting of a number of little wick tubes to half the circumference surrounded by a sheet of brass (in German termed "Mitrailleuse Brenner mit flacher Umdachung"). In or about the month of February, 1880, when I had succeeded to attain this my object, I showed this "Mitrailleuse burner" to a friend of mine, Mr. Robert Koppen, owner of the firm of Hugo Koeppen, at his residence, No. 59 Wasserthan Str., Berlin, he being also a manufacturer of lamps.

In examining the said burner devised and made by me he stated that the same resembled much a drawing of a "Mitrailleuse" burner which Messrs. Schwintzer & Graeff had reported to the German patent office for getting letters patent therefor. For the sake of comparison he had the kindness to procure for me a specimen of such Mitrailleuse burner prepared by the firm of Schwintzer & Graeff. In comparing both burners we found that the distinctive characteristics were but an insignificant feature.

In the month of March, 1880, I filed application for the grant of letters patent with the German patent office, which, however, was not granted to me, considering the fact that letters patent for an invention of a quite similar invention had been granted to the firm of Schwintzer & Graeff. Being of opinion that the whole matter was not worth commencing a lawsuit for the protection of my rights, I abandoned the idea of appearing in court in the premises, but
172 proceeded to manufacture and sell lamps having the Mitrailleuse burner devised by me solely. In 1881 the firm of Schwintzer & Graeff commenced lawsuit against me for infringement of their German patents. Final decision was given by the royal Prussian superior court (Landgericht) I, at Berlin, under date of March 1st, 1882, which, as will appear from an authenticated copy of such judgment, summed up the case by deciding, that, considering the fact—

"That the defendant (I) had made use of and more particularly had made arrangements necessary for such use as early as prior to the fourteenth of November, 1879; hence at the time of filing an application by Schwintzer and Graeff for a German letters patent the defendant (I) should not be deemed guilty of having infringed the German patent act, and that the cost of the procedure should be charged to the treasury of the Prussian state."

I expressly declare that prior to that time I had no knowledge whatever that the firm of Schwintzer & Graeff had made or acquired a similar invention; on the contrary, Mr. Johann Eckel, formerly foreman of this firm, now a manufacturer himself at Berlin, told me, in the year 1884, that not the said firm of Schwintzer & Graeff, but he himself was the original and true inventor of the "Mitrailleuse burner" for which they obtained a German letters patent.

When no longer in their service he commenced lawsuit against them in the premises, but his bill of complaint was rejected by the court under the German patent law for the reason that at the time of making said invention he was an employee of that firm.

W. H. HECHT.

[SEAL.] Affirmed to and subscribed before me this 29th day of June, A. D. 1886.

T. RAINE,
Consul General of the United States of America.

173 GERMAN EMPIRE,
Kingdom of Prussia, City of Berlin.

I, the undersigned, Robert Koeppen, owner of the firm of Hugo Koeppen, of the city of Berlin aforesaid, engaged in the manufacture of lamps, 42 years old, do hereby declare the following:

Wilhelm Herrmann Hecht, a lamp manufacturer, of the said city of Berlin, from whom I have bought so-called "Mitrailleuse" burners for a number of years prior to 1879, appeared in or about the beginning of March, 1880, at my business office and showed me one of his Mitrailleuse burners, in which he had made a novel improvement.

In closely examining this improved burner I noticed at once that same resembled much a Mitrailleuse burner, a drawing of which accompanied an advertisement of Messrs. Schwintzer & Graeff, Berlin, in the "Stuttgarter Zeitung für Blech-Industrie." For a closer comparison I sent for a specimen of the Mitrailleuse burner advertised by said firm as novelty, and we, said Hecht and myself, found in comparing this burner with the Hecht's that the latter's burner was similar to the burner of Schwintzer & Graeff for which they had obtained a German letters patent under date of November 13, 1879.

While the invention of Schwintzer & Graeff relates to a complete surrounding and covering the spaces between the wick tubes with a brass mantle, the brass mantle of Hecht's invention covers the inside space between the tubes only to half of the circumference.

Despite of the similar appearance of both said burners, I am positive, as expert in such matters, considering the amount of work to be done in trying a novel improvement, that the said Hecht, a long time prior to the 13th of November, 1879, was engaged in reducing to practice the idea which he had conceived with regard to his improvement in Mitrailleuse burners. In a lawsuit instituted by Schwintzer & Graeff in 1880 against Hecht I had, as one of the chief witnesses, to bear testimony of my knowledge of such facts, and Hecht was ultimately pronounced not guilty of infringing the patent of Schwintzer & Graeff.

ROBERT KOEPPEN.

174 Affirmed to and subscribed before me this 29th of June, A. D. 1886.

[SEAL.] T. RAINE,
Consul General of the United States of America.

(Endorsed:) Filed Aug. 19, 1887. L. S. B. Sawyer, clerk.

175 U. S. Circuit Court, Dist. of Cal.

GRAFF
v.
BOESCH. } No. 4107.

RESPONDENT'S EXHIBIT 5. S. C. H., Examiner.

Contract betw. Mr. Carl Schwintzer, Berlin, and Mr. Albert Gräff, San Francisco, Cal.

S. 1.

Mr. Albert Gräff binds himself to pay to Mr. Carl Schwintzer, instead of the, in the patent letter mentioned, one hundred dollars for the first year, the sum of two hundred and fifty marks, payable on the 1st February, 1886, and each following year on the same date the sum of five hundred marks (not less) till the amount of four thousand marks are paid in all.

S. 2.

Should Mr. Albert Gräff, of San Francisco, not be able to sell more than one thousand burners, called Diamond or Mitrailleuse burners No. 10621, manufactured by Messrs. Schwintzer & Gräff, of Berlin, he reserves to himself to make up a new agreement with Mr. Carl Schwintzer.

S. 3.

Should not Mr. Albert Gräff, San Francisco, against all expectations, stick to the agreements mentioned in S. 1 & 2, all titles of the patent letter ceded to him by Carl Schwintzer shall him return.

S. 4.

Mr. Carl Schwintzer, partner of the firm Schwintzer & Gräff, engages to deliver to Mr. Albert Gräff the said burners at the same price as before, if the market price of the metal does not exceed — make 150 per % kos., and promise likewise to effect any order promptly, if in his power.

CARL SCHWINTZER.
ALBERT GRAEFF.

(Endorsed:) Filed Aug. 19, 1887. L. S. B. Sawyer, clerk.

176 *Substitutions of Att'ys for Pl'ff.*

In the Circuit Court of the United States, Ninth Circuit, District of California.

ALBERT GRAFF and J. F. DONNELL, Complainants,
vs.
EMILE BOESCH, Respondent.
} No. 4107, Equity.

Substitution of solicitors for complainants.

Messrs. Langhorne & Miller are hereby employed as my solicitors in the above-entitled suit, and as such solicitors are hereby substituted in the place and stead of William H. Sharp, Esq.

ALBERT GRAFF, *Complainant.*

I hereby agree to the foregoing substitution of Messrs. Langhorne & Miller as solicitors for complainants in my place and stead in the above-entitled suit.

WM. H. SHARP,
Solicitor for Complainants.

Dated October 12th, 1886.

Endorsed: Filed Oct. 19, 1886. L. S. B. Sawyer, clerk.

177 At a stated term, to wit, the February term, A. D. 1889, of the circuit court of the United States of America of the ninth judicial circuit in and for the northern district of California, held at the court-room, in the city and county of San Francisco, on Thursday, the 21st day of February, in the year of our Lord one thousand eight hundred and eighty-nine.

Present: The Honorable Lorenzo Sawyer, circuit judge; Honorable George M. Sabin, U. S. district judge, district of Nevada.

Order Allowing Appeal.

ALBERT GRAFF *et al.*
vs.
EMILE BOESCH *et al.* } No. 4107.

On motion of J. L. Boone, Esq., of counsel for respondents herein, it is ordered that an appeal from the decree filed and entered herein on the 13th day of February, 1889, to the Supreme Court of the United States be, and the same hereby is, allowed, and that a certified transcript of the pleadings, depositions, evidence, and proceedings be forthwith transmitted to the Supreme Court of the United States.

178 *Bond on Appeal.*

In the Supreme Court of the United States.

EMILE BOESCH and MARTIN BAUER, Appellants,
vs.
ALBERT GRAFF and J. F. DONNELL, Appellees.

Know all men by these presents that we, E. Artigues and P. Klein, are held and firmly bound unto Albert Graff and J. F. Donnell, the above-named appellees, in the sum of seven thousand ($7,000.00) dollars, lawful money of the United States of America, to be paid to the said Albert Graff and J. F. Donnell, their executors and administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs and executors and administrators firmly by these presents.

Dated this 13th day of February, A. D. 1889.

The condition of this obligation is such that whereas Emile Boesch and Martin Bauer, appellants, have taken an appeal to the Supreme Court of the United States to reverse the decree filed and entered by the circuit court of the United States of America of the ninth judicial *district*, northern district of California, in the suit entitled Albert Graff and J. F. Donnell, complainants, *vs.* Emile Boesch and Martin Bauer, respondents, No. 4107, which said decree was filed and entered in said circuit court on the 13th day of February, 1889:

Now, therefore, if the above-named Emile Boesch and Martin Bauer shall prosecute their said appeal to effect and answer all costs and damages if they shall fail to make good their plea, then

this obligation shall be void; otherwise to remain in full force and effect.

E. ARTIGUES.
P. KLEIN.

Signed, sealed, and delivered in presence of—
M. G. LOEFLER.

STATE OF CALIFORNIA,
City and County of San Francisco, } ss:

E. Artigues and P. Klein, the persons named in and who subscribed the foregoing undertaking as the sureties thereto,
179 being severally duly sworn, each for himself says that he is worth the amount specified in said undertaking as the penalty thereof over and above all his just debts and liabilities, exclusive of property exempt from execution, and that he is a resident and householder within the State of California.

E. ARTIGUES.
P. KLEIN.

Subscribed and sworn to before me this 21st day of February, 1889.

[SEAL.] JAMES L. KING,
Notary Public.

Endorsed: Approved this 21st day of February, A. D. 1889. Lorenzo Sawyer, judge. Filed February 21st, 1889. L. S. B. Sawyer, clerk.

180 In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

ALBERT GRAFF and J. F. DONNELL, Complainants and Appellees,
vs.
EMILE BOESCH and MARTIN BAUER, Respondents and Appellants.
} No. 4107.

I, L. S. B. Sawyer, clerk of the circuit court of the United States of the ninth judicial circuit in and for the northern district of California, do hereby certify that the foregoing one hundred and seventy-nine written or printed pages, numbered from 1 to 179, inclusive, are a full, true, and correct copy of the record and of all proceedings in the above-entitled suit excepting Complainants' Exhibits A, B, and G, and Respondents' Exhibits 1 and 4, the originals of which exhibits, by stipulation of counsel for the respective parties and order of court, accompany this transcript, and that the said one hundred and seventy-nine pages, together with said original exhibits, constitute the transcript on appeal to the Supreme Court of the United States.

Attest my hand and the seal of said circuit court this 23d day of September, A. D. 1889.

[Seal U. S. Circuit Court, Northern Dist., Cal.]

L. S. B. SAWYER, *Clerk.*

181 In the Circuit Court of the United States in and for the Northern District of California.

ALBERT GRAFF *et al.*, Complainants,
vs.
EMILE BOESCH *et al.*, Respondents. } No. 4107.

It is hereby stipulated and agreed by and between the solicitors for the respective parties in the above-entitled suit that the hereinafter-mentioned exhibits may be withdrawn from the files of this court for the purpose of forwarding them to the Supreme Court of the United States as a part of the transcript on appeal herein, viz., Complainants' Exhibit A, certified copy of letters patent No. 289,571, granted to Swintzer & Graff December 4th, 1883, for improvement in lamp burners; Complainants' Exhibits B and C, lamp burners; Complainants' Exhibit D, certified copy of assignment of Wilhelm Graff to Albert Graff of ½ interest of certain letters patent, partly in the German language; Complainants' Exhibit G, document in the German language; Respondents' Exhibit I, document in the German language; Respondents' Exhibit 4, document in the German language.

LANGHORNE & MILLER,
Solicitors for Complainants and Appellees.
SCRIVNER & BOONE,
Solicitors for Respondents & Appellants.

So ordered:
SAWYER, *Circuit Judge.*

Endorsed: Filed Sept. 19th, 1889. L. S. B. Sawyer, clerk, by F. D. Monckton, deputy clerk.

182 I, L. S. B. Sawyer, clerk of the circuit court of the United States for the northern district of California, do hereby certify the foregoing to be a full, true, and correct copy of an original stipulation and order filed on the 19th day of September, 1889, in the suit entitled Albert Graff *et al. vs.* Emile Boesch *et al.*, No. 4107, in our said circuit court.

Attest my hand and the seal of said circuit court this 23rd day of September, A. D. 1889.

[Seal U. S. Circuit Court, Northern Dist. Cal.]

L. S. B. SAWYER, *Clerk,*
By F. D. MONCKTON,
Deputy Clerk.

183 UNITED STATES OF AMERICA, *ss:*

To Albert Graaf and J. F. Donnell, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the city of Washington, in the District of Columbia, on the 14th day of October, A. D. 1889, pursuant to an order allowing an appeal from the final decree of the circuit court of the United States in and for the north-

ern district of California, wherein Emile Boesch and Martin Bauer, are appellants and you are appellees, to show cause, if any there be why the said decree in the said order mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Lorenzo Sawyer, judge of the circuit court of the United States, 9th circuit, this 21st day of February, A. D. 1889, and of the Independence of the United States the one hundred and thirteenth.

LORENZO SAWYER,
Circuit Judge.

184 [Endorsed:] 4107. In the Supreme Court of the United States. Albert Graaf and J. F. Donnell *vs.* Emile Boesch and Martin Bauer. Citation. Filed February 21st, 1889. L. S. B. Sawyer, clerk U. S. circuit court, northern district of California.

Service of the within citation by copy admitted this 21st day of February, 1889.

LANGHORNE & MILLER,
Solicitors for Complainants.

185 U. S. Circuit Court, Dist. of Cal.

GRAFF
v.
BOESCH. } No. 4107.

COMPLAINANT'S EXHIBIT A. S. C. H., Examiner.

(2–175.)

3286.

DEPARTMENT OF THE INTERIOR,

[Vignette.]

UNITED STATES PATENT OFFICE.

To all persons to whom these presents shall come, Greeting:

This is to certify that the annexed is a true copy from the records of this office of the letters patent granted Carl Schwintzer, Wilhelm Gräff, and J. F. Donnell and Company December 4, 1883, number 289,571, for improvement in lamp burners.

In testimony whereof I, Benj. Butterworth, Commissioner of Patents, have caused the seal of the Patent Office to be affixed this 3d day of March, in the year of our Lord one thousand eight hundred and eighty-five, and of the Independence of the United States the one hundred and ninth.

Seal Patent Office, United States of America.

BENJ. BUTTERWORTH,
Commissioner.

(2–155.)

186 No. 289,571.

THE UNITED STATES OF AMERICA.

[Vignette.]

To all to whom these presents shall come:

Whereas Carl Schwintzer and Wilhelm Gräff, of Berlin, Germany, have presented to the Commissioner of Patents a petition praying for the grant of letters patent for an alleged new and useful improvement in lamp burners, they having assigned one-half of their right, title, and interest in said improvement to J. F. Donnell & Co., of New York, a description of which invention is contained in the specification of which a copy is hereunto annexed and made a part hereof, and have complied with the various requirements of law in such cases made and provided; and

Whereas, upon due examination made, the said claimants are adjudged to be justly entitled to a patent under the law:

Now, therefore, these letters patent are to grant unto the said Carl Schwintzer, Wilhelm Gräff, and J. F. Donnell & Co., their heirs or assigns, for the term of seventeen years from the fourth day of December, one thousand eight hundred and eighty-three, the exclusive right to make, use, and vend the said invention throughout the United States and the Territories thereof, subject to the limitation prescribed by sec. 4887 Rev. Stats., by reason of German patents dated November 14, 1879, No. 10621, January 13, 1880, No. 10846, and March 26, 1880, No. 11713.

In testimony whereof I have hereunto set my hand and caused the seal of the Patent Office to be affixed, at the city of Washington, this fourth day of December, in the year of our Lord one thousand eight hundred and eighty-three, and of the Independence of the United States of America the one hundred and eighth.

Seal Patent Office, United States of America.

M. L. JOSLYN,
Acting Secretary of the Interior.

Countersigned:
BENJ. BUTTERWORTH,
Commissioner of Patents.

189 UNITED STATES PATENT OFFICE.

CARL SCHWINTZER and WILHELM GRAFF, of Berlin, Germany, assignors of one-half to J. F. Donnell & Co., of New York.

Lamp-Burner.

Specification forming part of Letters Patent No. 289,571, dated December 4, 1883.

Application filed July 28, 1883. (No model.) Patented in Germany November 14, 1879, No. 10621, January 13, 1880, No. 10846, and March 26, 1880, No. 11713.

To all whom it may concern:

Be it known that we, Carl Schwintzer and Wilhelm Gräff, subjects of the King of Prussia, German Emperor, residing at the city of Berlin, Prussia, Germany, have invented certain new and useful improvements in lamp-burners (for which letters patent have heretofore been granted to us by the Government of Germany, No. 10621, dated November 14, 1879, No. 10846, dated January 13, 1880, and No. 11713, dated March 26, 1880), of which the following is a specification:

This invention has reference to an improved lamp-burner of that class in which a series of wick-tubes are arranged equidistantly from the axis of the burner, and moved up and down in a series of guide-tubes, the burners of said class being known by the name of "Mitrailleuse" burners; and the invention consists of a ring-shaped cap arranged at the upper part of fixed guide-tubes, said cap being provided with openings for the wicks. The pinion by which the wicks and wick-tubes are adjusted is placed entirely within an annular casing of the burner, and is rendered accessible by a detachable ring at the lower part of said casing. The actuating-pinion engages a rack-bar that is attached by an inwardly-extending arm to the center of the bottom plate of the wick-tubes, said rack being located between two adjoining wick-tubes. The bottom plate of the wick-tubes is provided with a hinged stop device, so as to prevent the wick-tubes from projecting above the guide-tubes and thereby avoid the burning of hooks arranged at the upper ends of the wick-tubes.

In the accompanying drawings.

(Here follow diagrams marked pp. 187 & 188.)

Figure 1 represents a side elevation of my improved burner. Fig. 2 is a vertical central section of the same; and Figs. 3, 4, 5, and 6 are horizontal sections, respectively, on lines *v v*, Fig. 1, and *x x*, *y y*, and *z z*, Fig. 2.

Similar letters of reference indicate the corresponding parts.

In the drawings, A represents an annular casing which encircles a series of fixed guide-tubes, *a a*, that are arranged equidistantly from the axis of the burner. To the upper ends of the guide-tubes

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No Model.) 2 Sheets—Sheet 1.

C. SCHWINTZER & W. GRÄFF.

LAMP BURNER.

No. 289,571. Patented Dec. 4, 1883.

No. 1408.
Borsch et al. } p. 189
Graaf et al.

fig. 1

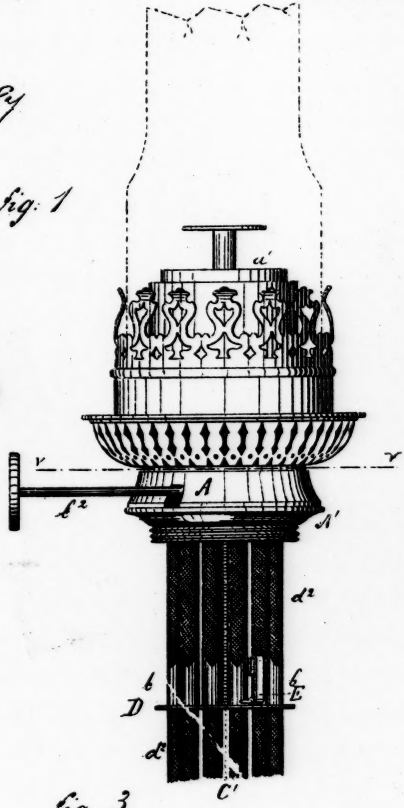
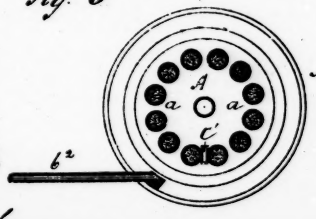


fig. 3



WITNESSES:
A. Schehl
Otto Risch.

INVENTORS
Carl Schwintzer &
Wilhelm Gräff
BY
Goepel & Raegener
ATTORNEYS.

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(No Model.) 2 Sheets—Sheet 2.

C. SCHWINTZER & W. GRÄFF.

LAMP BURNER.

No. 289,571. Patented Dec. 4, 1883

No. 1408.
Borschdel.
Gräf et al.
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Fig. 2.

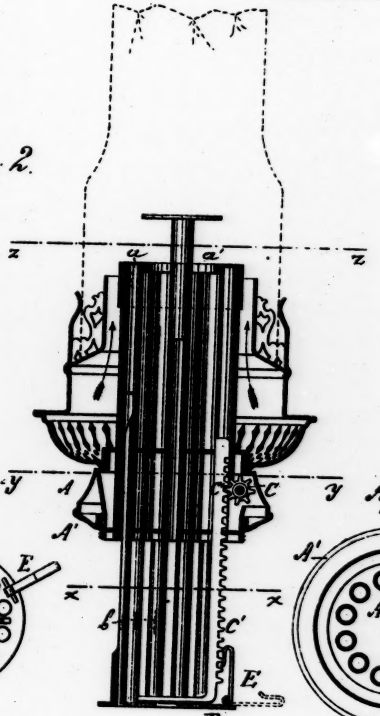


Fig. 4.

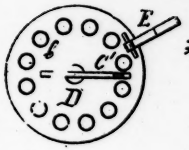


Fig. 5.

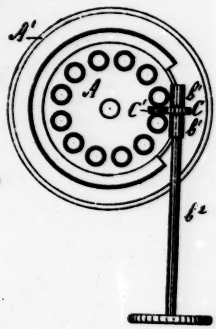
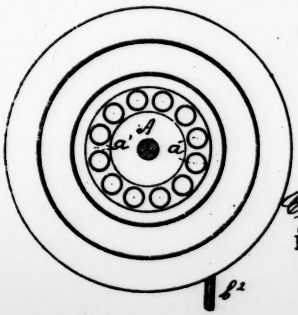


Fig. 6



WITNESSES:
A. Schehl
Otto Risch.

INVENTORS
Carl Schwintzer &
Wilhelm Gräff
BY
Dodge & Baegner
ATTORNEYS.

a a is attached a ring-shaped cap, *a'*, which is provided with openings for the wick and wick-tubes *b b*. The ring-shaped cap *a'* closes the intermediate space between the upper ends of the tubes *a a*, so as to protect not only the upper ends of the guide-tubes against being burned by the flame, but also produces a continuous and even flame, which would not be the case if direct access of air be given to each wick. The inner flange of the ring-shaped cap *a'* is much shorter than the outer flange, so that the air that is drawn through the interior of the burner and fed to the inner surface of the flame is obstructed as little as possible, while the larger outer flange conducts the air to the outer surface of the flame. At its lower part the casing A is furnished with a detachable ring, A', that is screwed over the threaded portion of said casing. The threaded portion serves, also, for the purpose of screwing the burner into the collar of the neck of the oil receptacle.

On a shoulder of the casing A a gallery of the usual construction is supported, by which air is conducted to the wicks and a support is furnished for the chimney. At the inside of the casing A are arranged bearings *b'* for a pinion-shaft, b^2, which is extended laterally through an opening of the casing, and provided at the outer end with the usual milled head. A pinion, C, is fastened to the shaft b^2 intermediately between the bearings *b'*, and is entirely inclosed by the casing A, but readily accessible for repairs by means of the detachable screw-ring A'. The pinion *b* engages a vertical rack, C', which is located between two adjoining wick-tubes, *a a*, and provided with an inwardly-bent arm that is attached to the center of the bottom plate D of the wick-tubes. By thus securing the inwardly-extending arm of the rack C' to the center of the bottom plate, the easy and regular up-and-down motion of the wick-tubes is secured, while side strains that might interfere with the easy motion of the wick-tubes in the guide-tubes are obviated. The wick-tubes *b b* are moved up and down in the guide-tubes *a a* by the action of the rack and pinion, the motion of the rack C' being steadied by openings in the top and bottom plates of the casing A. To
190 the bottom plate D of the wick-tubes is applied a hinged stop device, E, which can be thrown in vertical or horizontal position, as shown in Fig. 2. When in vertical position, the stop E abuts against the bottom plate of the casing A when the wick-tubes are raised to that extent, and prevents thereby the upper ends of the wick-tubes from projecting above the upper ends of the guide-tubes, thereby avoiding the burning of the wick-holding hooks at the upper ends of the wick-tubes. In this position the stop E is retained by means of its hook-shaped upper part, which is pressed between two adjoining wick-tubes, as shown in Fig. 1, and thereby retained in position. When wicks d^2 are to be inserted into the wick-tubes *b b*, the stop device E is placed in a horizontal position, as shown in dotted lines in Fig. —. The pinion C is then turned and the wick-tubes *b b* raised until their upper ends are caused to project above the guide-tubes *a a*, so that the wicks can be readily drawn in by a suitable device for this purpose.

The advantages of our improvements are that they give a con-

tinuous flame; that they obviate the necessity of providing a special casing for the pinion, and also furnish ready access to the latter. The rack is preserved from injury by being placed between two of the wick-tubes, while the stop device prevents injury to the hooks at the upper ends of the wick-tubes, which would render the burner useless.

Having thus described our invention, we claim as new and desire to secure by letters patent—

1. In a lamp-burner of the class described, the combination, with the guide-tubes, of a ring-shaped cap provided with openings for the wicks, said cap being applied to the upper ends of the guide-tubes, so as to close the intermediate spaces between the same, substantially as set forth.

2. In a lamp-burner of the class described, the combination of the fixed guide-tubes, a series of wick-tubes moving therein, a rack for actuating the same, arranged at one side thereof, a pinion for engaging the rack, and an annular inclosing-casing made of a fixed portion and a detachable ring-section, whereby ready access is given to the pinion, substantially as set forth.

3. In a lamp-burner of the class described, the combination of a system of wick-tubes connected by a bottom plate, a series of guide-tubes, means for raising or lowering the wick-tubes, and a stop device hinged to the bottom plate and adapted to be thrown into vertical or horizontal position, so as to serve either as a stop for the wick-tubes or admit their being raised above the guide-tubes for inserting the wicks, substantially as specified.

In testimony that we claim this as our own invention we have hereunto set our hands in the presence of two subscribing witnesses.

CARL SCHWINTZER.
WILHELM GRÄFF.

Witnesses:
B. ROI.
G. H. SMITH.

[Endorsed:] 4107. Filed Aug. 19, 1887. L. S. B. Sawyer, clerk.

191 U. S. Circuit Court, Dist. of Cal.

GRAFF
v.
BOESCH. } No. 4107.

COMPLAINANT'S EXHIBIT D. S. C. H., Examiner.

Received for record January 31, 1885, and recorded in Liber B 31, page 384, of Transfers of Patents.

Seal Patent Office United States of, America.

In testimony whereof I have caused the seal of the Patent Office to be hereunto affixed.

BENJ. BUTTERWORTH,
Commissioner of Patents.

Ex'd: F. C. T.

[Stamps and cancellation marks.]

Whereas letters patent of the United States No. 289,571, dated December 4th, 1883, were granted to Carl Schwintzer and Wilhelm Gräff, of Berlin, Germany, assignors of one-half to J. F. Donnell & Co., of New York, for improvements in lamp burners (for which letters patent had previously been granted to them by the Government of Germany, No. 10621, dated Nov. 14th, 1879; No. 10846, dated Jan. 13th, 1880, and No. 11713, dated March 26th, 1880); and whereas said Wilhelm Gräff is now the joint owner with the said Carl Schwintzer of the undivided one-half interest in the said patent for, to, and in the United States; and whereas Albert Gräff, of the city and county of San Francisco, State of California, is desirous of obtaining an interest therein, and has made certain propositions which said Wilhelm Gräff has accepted:

Now, therefore, in consideration of the sum of one hundred dollars and for other valuable considerations, the receipt of which is hereby acknowledged, I, the said Wilhelm Gräff, have sold, assigned, and transfer-ed, and by these presents do sell, assign, and transfer, unto the said Albert Gräff the full undivided one-sixth part of
192 all my right, title, and interest in and to the said invention and to the letters patent therefor aforesaid, the said undivided interest to be held and enjoyed by the said Albert Gräff for his own use and behoof and for the use and behoof of his legal representatives to the full end of the term for which said letters patent are or may be granted or extended, as fully and entirely as the same would have been held and enjoyed by me had this assignment and sale not been made.

In testimony whereof I have hereunto set my hand and affixed my seal, at Berlin, Germany, this 18th day of September, A. D. 1884.

WILHELM GRÄFF.

In presence of—

Vorstehende eigenhändige Unterschrift des Herrn Wilh. Gräff wird hierdurg amtlich beglaubigt.

Berlin, d. 18ten Sept'b'r, 1884.

ALBERT WEHL,
Vorsteher des 89 Stadt Bz.

[Seal Turnhallen-Bezirk, Berlin.]

193 [Endorsed:] 4107. S. 31. 7179. 42. Patent Office, Jan. 31, 1885, U. S. A. Filed Aug. 19, 1887. L. S. B. Sawyer, clerk. J. H. Redstone, 1509 Market St., San Francisco, Cal. 2126, Pat. Office, div. D., 1885. Fee, $2; p'd.

[Endorsed:] 4107. Ex. D. Graff to Graff, ⅙. Sep. 18, '84.

194 U. S. Circuit Court, Dist. of Cal.

GRAFF
v.
BŒSCH
} No. 4107.

COMPLAINANT'S EXHIBIT G. S. C. H., Examiner.

Filed Aug. 17, 1887. L. S. B. Sawyer, clerk.

Gebühren:
Zustellung..... M.
Beglaubigung. "
(Blatt)..... "
Postgebühr..... "

A. D. R., No. —.

Abschrift: Ausfertigung nachstehenden Schriftstücks nebst Abschrift dieser Urkunde habe ich im Auftrage der Königlichen Staatsanwaltschaft I, zu Berlin, in einem mit dem Dienstsiegel verschlossenen, mit folgender Addresse: An die Lampenfabrikanten, Herren Schwintzer & Græff, zu ——, Sebastianstr. 18, versehenen Briefe zum Zwecke der Zustellung an den bezeichneten Empfänger der Postanstalt 52, zu ——, mit dem Ersuchen übergeben, die Zustellung einem Postboten des Bestimmungsortes aufzutragen.

Berlin, den 13ten Juni, 1885.

(Gez.) WEINBERG,
Hilfs-Gerichtsvollzieher in ——.

I. I d. No. 844, '84.

Im Namen des Königs! In der Strafsache gegen den Brennerfabrikanten, Julius Eckel, zu Berlin, wegen Patentverletzung, hat die 2te Strafkammer des Königlichen Landgerichts I, zu Berlin, in der Sitzung vom 5ten Februar, 1885, an welcher Theil genommen haben:

1. Markstein, Landgerichtsrath, Vorsitzender.
2. Bartisius, Amtsgerichtsrath.
3. v. Makomaski, Landgerichtsrath.
4. Graf v. Strachwitz, } Landrichter, als Richter.
5. Hedeman, }

Dr. Otto, Staatsanwalt, als Beamter der Staatsanwaltschaft.

Dr. Behrens, Referendar, als Gerichtsschreiber, für recht erkannt.

Dass der angeklagte Brennerfabrikant, Julius Eckel, ge-
195 boren am 19 März, 1844, zu Berlin, evangelisch, nicht bestraft, des Vergehens gegen das Patentgesetz schuldig, and deshalb unter Belastung mit den Kosten des Verfahrens zu bestrafen mit Zweihundert Mark Geldstrafe, der im Unvermögensfall für je zehn Mark ein Tag Gefängniss zu substituiren, ausserdem den verletzten Lampenfabrikanten Schwintzer und Græff, zu Berlin, die Befugniss zuzusprechen, binnen vier Wochen nach Zustellung einer Ausfertigung des rechtskräftigen Erkenntnisses die Verurtheilung auf Kosten des Angeklagten einmal durch Einrückung in die „Illustrirte Zeitung für Blechindustrie," zu Stuttgart, bekannt zu machen, ausserdem die beschlagnahmten Mitrailleusenbrenner einzuziehen.

Von Rechtswegen.

Gründe.

196 Die Lampenfabrikanten Schwintzer und Græff, zu Berlin, haben unter den 14ten November, 1879, vom Kaiserlichen Patentamt hierselbst ein Patent No. 10621 erhalten auf „flache Uederdachung der Räume zwischen den Dochtröhren an Mitrailleusenbrennern." Abweichend von den bis dahin üblichen Constructionen derartigen Brenner besteht die anwesentliche Neuheit der patentirten Mitrailleusenbrenner darin, dass der Zwischenraum zwischen den einzelnen Dochtröhren verdeckt ist, und dass damit, sowohl für die Reinhaltung des Brenners, als für die Leuchtkraft der Lampen, besondern, in der Patentschrift No. 10621 ausgegeben, den 21ten August, 1880, näher beschriebene, Vortheile erreicht werden. In der Fabrik der genannten Firma ist bis zum 6ten September, 1884, seit einer längeren Reihe von Jahren der Angeklagte als Werkführer in Diensten gewesen. Wie er selbst einräumt,
197 ist er von den Inhabern der Firma, namentlich als Vertrauensmann für Vornahme bezw. Erstrebung neuer Constructionen an Lampen und Brennern beschäftigt gewesen. In gleicher Weise ist er, wie durch das Zeugniss des Mitinhabers der Firma p. Græff erwiesen ist, auch bei Herstellung der hier fraglichen, zur Patentirung gelangten Brenner-Construction mitthätig gewesen. Der p. Græff hatte eine festere Verbindung der Einzelröhren der bisherigen Mitrailleusenbrenner für practischer gehalten, und hat auf seine Veranlassung, Angeklagter zunächst, in der Werkstatt der Fabrik Versuche einer dahin gehenden Neuconstruction gemacht, sodann aber in seiner im Fabrikgrundstück ebenfalls belegenen Privatwohnung Ausprobungen mit den schliesslich construirten neuen Brennern an Lampen vorgenommen.

Nach seinem Ausscheiden aus der Fabrik von Schwintzer
198 und Græff, im September, 1884, hat sich Angeklagter selbstständig als Brenner- und Lampenfabrikant etablirt, und hat alsbald begonnen, insbesonders auch genau dieselben Mitrailleusenbrenner mit flacher Ueberdachung der Räume zwischen den Dochtröhren, wie sie der Fiama Schwintzer und Græff patentirt sind, zu fabriciren und in den Handel zu bringen. Angeklagter gesteht dies völlig zu, räumt namentlich auch seine Kenntniss vom Patent der genannten Firma ein. Abgesehn von seinen unten zu erörternden rechtlichen Einwendungen, bestreitet er jedoch die völlige Identität der von ihm fabricirten Brenner mit den patentirten. Während nämlich die der genannten Firma patentirten Brenner an der inneren Höhlung der Ueberdachung rund seien, zeigten seine Brenner
199 eine gerinfte innere Fläche der Ueberdachung. Dementgegen hat jedoch der Gerichtshof auf Grund des Gutachtens des Civilingenieurs Pütsch und des Augenscheins für erwiesen angenommen, dass der vom Angeklagten betonte Unterschied völlig bedeutungslos für den Zweck und die Verwandbarkeit des Fabrikats ist, und höchstens eine ästhatishe, keinenfalls eine technische, Aenderung dargestellt. Es steht hiernach fest dass die vom Angeklagten hergestellten Brenner mit den patentirten völlig iden-

tisch sind. Geständlich hat der Angeklagte etwa 300 Stück Brenner fabricirt und 200 Stück davon im ungefähren Verkaufswerthe von je 2 bis 3 Mark vertrieben. Als die Firma Schwintzer und Græff von diesem Verfahren des Angeklagten Kenntniss erhielt, hat sie zunächst auf gütlichem Wege versucht vom Angeklagten eine Einstellung seiner Fabrikation zu erreichen, und erst, als dies fruchtlos geblieben, rechtzeitig, am 25ten October, 1884, bei der Königlichen Staatsanwaltschaft den Antrag auf strafrechtliche Verfolgung des Angeklagten gestellt. Dieser Sachverhalt ist nach dem Gesammtergebniss der Beweisaufnahme, insbesondere dem Geständniss des Angeklagten und dem Aussagen der vernommenen Zeugen bezw. des Sachverständigen erwiesen.

Der Angeklagte hat sich durch sein Verfahren den Bestimmungen der §§ 34, 4, 5, des Reichs-Patent-Gesetzes gemäss, strafbar gemacht.

Dass er die Brenner, welche der Firma Schwintzer und Græff patentirt waren, gewerbsmässig hergestellt und in Verkehr gebracht hat steht nach seinem eigenen Zugeständniss fest, ebenso dass er von der Patenttirung Kenntniss hatte. Dass, ferner, seine Brenner völlig identisch mit denen der Firma Schwintzer und Græff ist ebenfalls durch die Beweisaufnahme festgestellt. Endlich konnte bei Lage des Falles nicht zweifelhaft sein dass Angeklagter sich bewusst gewesen ist das Patent der Firma Schwintzer und Græff durch die, ohne deren Erlaubniss, von ihm vorgenommene Fabrikation zu verletzen, m. a. W., dass er wissentlich gegen das Patentrecht verstossen hat.

Letzteres wird zwar vom Angeklagten unter Berufung auf § 5 des Reichs-Patent-Gesetzes in Abrede gestellt. Er wendet ein sich zur Herstellung der allerdings für Schwintzer und Græff patentirten Brenner für berechtigt gehalten zu haben. Er habe, giebt er an, nach verschiedenen Versuchen endlich eine allen Anforderungen entsprechende Construction hergestellt, habe einen solchen neuconstruirten Brenner auf die in seiner Privatwohnung gebrauchte Lampe geschraubt, und diese alsdann schon vor Weihnachten, 1878, also lange vor Anmeldung des Schwintzer und Græffschen Patentes, gebrannt und benutzt. Er gehöre somit zu den in Abs. 1, § 5, l. c., bezeichneten Personen, gegen welche vorliegendenfalls die Wirkung des Patents nicht eintreten könne. Thatsächlich mag richtig sein dass Angeklagter mehrfach den gn. Brenner schon vor der Patentmeldung des jetzigen Patentinhabers in seiner Wohnung gebrannt also benutzt hat. Wie durch die Aussage des Zeugen Græff feststeht, hat Angeklagter sehr häufig in seiner Stellung als Werkführer Lampentheile und dergleichen von den Chefs der Firma zum Ausprobiren in seine Wohnung erhalten. Es erscheint keineswegs auffällig dass auch vorliegendenfalls so verfahren ist. Angeklagter war aber gerade hier vom Zeugen Græff veranlasst gewesen, sich den Versuchen und Erprobungen der erstrebten verbesserten Construction der Brenner zu unterziehen. Deshalb war es durchaus zweckentsprechend, wenn Angeklagter dies in der von ihm geschilderten Weise gethan hat. Immer aber, und darauf kommt es wesentlich an, ist seine industrielle und mechanische Thätigkeit im Auftrage und im Namen

seiner damaligen Arbeitsgeber erfolgt. Angeklagter hat auch selbst damals nicht entfernt daran gedacht anders als für die Fabrik seiner Chefs, von denen er Bezahlung erhielt, thätig zu sein. Als der mit ihm in derselben Fabrik beschäftigte Metallarbeiter Bray, in der Privatwohnung des Angeklagten, die gn. neuen Brenner gesehen, ist schon ausdrücklich davon die Rede gewesen, wie durch das Zeugniss des Bray feststeht, dass von Schwintzer und Graeff das Patent auf die neue Construction nachgesucht werden solle.

Nach alledem fehlt es für Anwendung des angezogenen, § 5, Abs. 1, l. c., an dessen wesentlichster Voraussetzung, nämlich, an
204 einer eigenen und selbständigen, für eigne Zwecke und im eigenen Interesse erfolgten Benutzung.

Der § 5, Abs. 1, l. c., ist—vergl. Dambach, Patentgesetz, 1877, Seite 21; Motive zum Patentgesetz vom 25 I, 1877—der Erwägung entsprungen, dass die Vorschrift des § 2, l. c., welche die Patent-Ertheilung auf

a, bereits öffentlich beschriebene, und

b, auf bereits offenkundig im Inlande betriebene Erfindungen ausschliesst, eine Härte gegen diejenigen Personen enthalten würde, welche die Erfindung nicht offenkundig bereits zur Zeit der Anmeldung des Patentinhabers in Benutzung gehabt haben. Es soll daher durch § 5, Abs. 1, in allen Fällen letzterer Art der berechtigte Besitzstand gegen die Einwirkung des später verliehenen Privile-
205 giums geschützt werden. Die selbstverständliche Voraussetzung ist hier also immer die Collision mündestens zweier Berechtigter. Solche Collision liegt zwischen Schwintzer und Graeff einerseits, und dem Angeklagten andrerseits, schlechterdings nicht vor, weil Letzterer gewissermassen nur als Theil der Persönlichkeit der Ersteren—d. h., als ihr bezahltes industrielles Organ für diese und namens dieser die erwähnten Benutzungs-Handlungen vorgenommen hat. Angeklagter hat selbst nur diejenige Thätigkeit für seine Arbeitgeber entwickelt, welche notwendig war, um die Construction praktisch verwerthbar und damit patentfähig erscheinen zu lassen. Völlig unrichtig ist es, wenn hierbei Angeklagter die Priorität der Iden für sich in Anspruch nehmen will. Nach der Aussage des Zeugen Graeff steht vielmehr fest dass dieser den leitenden Gedanken
206 ausgegeben und durch Angeklagten zur praktischen Ausführung hat bringen lassen. Graeff motivirt letzteres in anschaulicher Weise mit der Angabe dass er Klempnerarbeiten nicht mache.

Hiernach steht nicht mehr ein zu schützendes Recht eines besser Berechtigten dem formellen Recht des Patentinhabers gegenüber. Angeklagter hat vielmehr gewissermassen an der Patent-Erlangung seiner Arbeitgeber mitgearbeitet, nicht aber ist ihm die Verwerthung eigner älterer Rechte durch das Patent unmöglich geworden. Entfällt hiernach die Anwendbarkeit des § 5, Abs. 1, l. c., so kann ferner hahin gestellt bleiben, in wie fern Angeklagter willens und im stande gewesen, etwa den Einwand der Priorität der Erfindung resp. einer offenkundigen und damit jedem anderen Sachverständigen

ermöglichten Benutzung (§ 2, l. c.) zu erheben. Nach beiden
207 Richtungen ist eine Prüfung seitens des Gerichts ausgeschlossen, da beide Eventualitäten nur einen Grund zur Richtigkeits-Erklärung des Patents bieten würden (§§ 10, 27, l. c., vergl. Entscheidungen des Reichsgerichts, Band III, Seite 253).

Nach allem Vorgetragenen verdient die Angabe des Angeklagten, er habe sich gleichwohl zu den in § 5, l. c., erwähnten Personen rechnen zu müssen geglaubt, keinen Glauben. Wie die Verhältnisse bei den Vorarbeiten zur Patentirung von Schwintzer und Græff nach dem festgestellten Ergebniss der Beweisaufnahme gelegen haben, war für irgend einem Zweifel des Angeklagten an der vollen Wirkung des gn. Patentes auch gegen ihn kein Raum. Er hat, wie der Gerichtshof für erwiesen erachtet, gewusst dass er nur für Schwintzer und Græff gearbeitet, und dass er durch die Fa-
208 brikation derselben Brenner deren Patent verletzte. Es ist daher thatsächlich als festgestellt angenommen dass der Angeklagte, zu Berlin, im September und October, 1884, wissentlich den Bestimmungen der §§ 4, 5, des Reichspatentgesetzes zuwider, eine Erfindung in Benutzung genommen hat, indem er ohne Erlaubniss des Patentinhabers, Fabrikanten Schwintzer und Græff, su Berlin, den Gegenstand der Erfindung derselben, nämlich, die flache Ueberdachung der Räume zwischen den Dochtröhren an Mitrailleusenbrenner, Patent No. 10621, gewerbsmässig hergestellt und in verkehr gebracht hat.

Bei Abmessung der hiernach gegen den Angeklagten auf Grund der §§ 34, ff., 4, 5, des Reichs-Patentgesetzes, §§ 29, 40, des Reichsstrafgesetzbuchs zu verfügenden Strafe, ist einerseits die bis-
209 herige Unbescholtenheit des Angeklagten, andererseits der beträchtliche Schaden in Betracht gezogen, der den Patentinhabern durch das Verfahren des Angeklagten, der ca. 200 Brenner, je @ 2–3 Mark werth, verkauft hat, erwachsen ist. Danach erschien die verhängte Strafe angemessen. Gleichzeitig ist nach § 40, R. Str-G.-B., auf Einziehung der beschlagnahmten Mitrailleusenbrenner, als Gegenstände, welche durch das gn. vorsätzliche Vergehen des Angeklagten hervorgebracht und zur Begehung desselben gebraucht sind, erkannt.

Die Bestimmung über Publikationsbefugniss der Antragsteller gründet sich auf § 35 des Reichs-Patentgesetzes.

Den Kostenpunkt regelt § 497 der Straf-Prozess-Ordnung.

(Gez.) MARKSTEIN.
BARTISIUS.
v. MAKOMASKI.
Graf STRACHWITZ.
HEDEMANN.

210 Vorstehendes Urtheil wird hierdurch mit dem Bemerken ausgefertigt dass dasselbe nach Lage der Akten die Rechtskraft beschritten hat.

Berlin, den 3ten Juni, 1885.

[Seal Kön. Preuss. Landgericht I, Berlin.]

DRIESEL,
Gerichtschreiber der IIten Strafkammer des Königlichen Landgerichts I.

Ausfertigung für the Lampenfabrikanten Schwintzer und Græff.

Vorstehende Unterschrift des Gerichtschreibers der II. Strafkammer des königl. Landgerichts I, zu Berlin, Landgerichts-Secretärs Driesel, wird hierdurch beglaubigt.

Berlin, den 29 Juni, 1886.

[Seal Der Präsident des Kön. Preuss. Landgerichts I, Berlin.]

JUNGHANN,
Landgerichts-Director.

Der Präsident des Königlichen Landgerichts I. in Verträtung.

I G., 67 bl.

Consulate General of the United States of America, at the city of Berlin, in the Kingdom of Prussia, German Empire, } *ss:*

This is to certify that Mr. Junghann, whose name is subscribed to the annexed and foregoing attestation, was at the time of subscribing same and is now a justice and director duly commissioned and qualified in and for the district of the superior court of justice I., at the city of Berlin, in Prussia, German Empire, that his signature and the seal of such court are genuine and correct, and that full faith and credence are due to his acts as such.

Witness my hand and consular seal of office this 29th day of June, A. D. 1886.

[Seal Consulate General of the United States, Berlin.]

F. RAINE,
Consul General of the United States of America.

No. 419. Rec'd fee, $2.00.

S. K. II, 3230.

211 [Postage stamp.]

An die Lampenfabrikanten Herrn Schwintzer & Græff,

Hier,

Sebastiansstr. 18.

Portopfl. Dienstsache.
Frei.
Zust.-Urk., nebst Abschrift.
1 D., 4894.

212 U. S. Circuit Court, Dist. of Cal.

GRAFF
v.
BŒSCH. } No. 4107.

RESPONDENT'S EXHIBIT I. S. C. H., Examiner.

I. H., 779, '80.

S. K. I, 3709.

Im Namen des Königs! In der Strafsache gegen den Drechslermeister und Lampenfabrikanten Wilhelm Herrmann Hecht, zu Steglitz, wegen Vergehens gegen das Patentgesetz, hat the erste Strafkammer des Königlichen Landgerichts I, zu Berlin, in der Sitzung vom 1ten März, Eintausend Achthundred u. Zwei u. Achtzig (1882), an welcher Theil genommen haben:

1. Fleischmann, Landgerichtsrath.
2. Kandelhardt, "
3. Brausewetter, "
4. Paulitzky, Amtsgerichtsrath.
5. Leuschner, Ger.-Assessor, als Richter.

Joren, Ger.-Assessor, als Beamter der Staatsanwaltschaft.

Kornicki, Referendar, als Gerichtsschreiber, für recht erkannt.

Dass der Angeklagte Drechslermeister und Lampenfa-
213 brikant, Wilhelm Herrmann Hecht, geboren zu Cottbus, am 13 Januar, 1837, evangelish, der Verletzung des Patentgesetzes nicht schuldig, die Kosten des Verfahrens der Staatskasse aufzuerlegen.

Gründe.

Die hiesigen Lampenfabrikanten Schwintzer und Græff hatten unterm 13 November, 1879, bei dem Kaiserlichen Patentamt ein Patent „auf flache Ueberdachung am Mitraileusenbrenner" angemeldet, und in Folge dessen, unter No. 1062, ein Patent, vom 14 November, 1879, beginnend, erhalten, worin als Gegenstand des Patents „flache Ueberdachung der Räume zwischen den
214 Dochtröhren am Mitraileusenbrenner" bezeichnet wurde.

Der Angeklagte suchte gleichfalls unter dem 30 März, 1880, ein Patent für einen Mitraileusenbrenner nach, die in ihrem oberen Ende zur Hälfte eingefasten Dochtröhren enthaltend, wurde jedoch unter den 12ten October, 1880, dahin beschieden dass die zur Hälfte eingefassten Dochtröhren bereits in dem Schwintzer Græffschen Patente geschützt sein.

Nichtsdestoweniger verkaufte der Angeklagte, unter dem 20 December, 1880, an die Firma Necke und Springmann sechs von ihm hergestellte Brenner, in Betreff deren die Firma Schwintzer und Græff eine Nachahmung des ihr ertheilten Patentes behauptet.

Vorstehende Thatsachen sind durch die Patentschrift, die amt-

liche Auskunft des Kaiserlichen Patentamts vom 30ten Oc-
215 tober, 1880, das eidliche Zeugniss des Lampenfabrikanten Græff, und das Zugeständniss des Angeklagten, erwiesen.

Die Beschädigten haben den Strafantrag rechtzeitig gestellt.

Dass dem Angeklagten von der Firma Schwintzer und Græff die Erlaubniss zur Herstellung der patentirten Gegenstände ertheilt worden sei, behauptet derselbe nicht. Er bestreitet vielmehr, zunächst, dass der von ihm hergestellte Mitraileusenbrenner für eine Nachahmung des patentirten erachtet werden könne, von dem er sich wesentlich unterscheide. Sodann behauptet er dass selbst, wenn dies der Fall wäre, er doch durch den § 5 des deutschen Patentgesetzes geschützt sei, da er bereits vor der Anmeldung des fraglichen Patents sich mit der Herstellung solcher Mitraileusenbrenner
216 beschäftigt insbesondere, die zu deren Herstellung von ihm benutzten Apparate (Stempel und Schnitte) nach eigener Idee angefertigt habe.

I.

Der Gerichtshof hat die Ueberzeugung gewonnen dass die flache Ueberdachung an den von dem Angeklagten hergestellten Mitraileusenbrennern wesentlich identish *identisch* ist mit der für Schwintzer und Græff unter No. 10621 patentirten Erfindung.

An dem Hechtschen Brenner ist wie an dem Schwintzer und Græffschen eine Ueberdachung der Räume zwischen den Dochtröhren angebracht, nur umschliesst dieselbe die Röhren nicht ringsum, sondern von der äusseren Seite des Brenners ab, etwa nur bis zur Hälfte. Dies ergab eine Vergleichung der beiden Modelle in
217 Uebereinstimmung mit der amtlichen Auskunft des Kaiserlichen Patentamts vom 30 October, 1880, und den eidlichen Gutachten der Sachverständigen Preetz und Wilop.

Der gedachte Unterschied der beiden Brenner ist kein principieller. Der patentirte Brenner hat der Hauptsache nach den Zweck, beim Abstreichen des Dochtes, eine Ansammlung von Schmutz zwischen den Rohren zu verhüten, und denselben unter sich eine grössere Festigkeit zu geben. Dieser selbe Zweck wird durch den Hechtschen Brenner nur in geringerem Masse erreicht.

Hierin stimmen die Auskunft des Kaiserlichen Patentamts vom 30 October, 1880, und die Gutachten von Preetz und Wilop überein. Wilop bekundete dass bei der Aehnlichkeit der Mittel der
218 Zweck der patentirten Erfindung durch den Hechtschen Brenner weniger gut erreicht werde, dass dagegen bei dem Hechtschen Brenner der Flamme mehr Luft zugeführt werde als bei dem patentirten. Dies erscheint jedoch nicht als ein wesentlicher Unterschied und widerspricht nicht der gutachtlichen Aeusserung des Kaiserlichen Patentamts und des Preetz, dass die Aehnlichkeit der beiden Brenner so gross sei dass der eine wie eine Nachahmung des anderen erscheine.

Schwintzer und Græff haben ihre Erfindung am 13 November, 1879, zur Patentirung angemeldet, der Angeklagte wurde unter den 12ten October, 1880, auf sein Gesuch um Patentirung seines Brenners, abschläglich beschieden.

Er verkaufte trotzdem 6 Brenner am 30 December, 1880, an Neske und Springmann. Er würde daher wegen wissent-
219 licher Benutzung der patentirten Erfindung zu bestrafen sein, falls ihn nicht der § 5 des Patentgesetzes schützt.

II.

Das Gesammtergebniss der stattgefundenen Beweisaufnahme hat den Gerichtshof zu der Ueberzeugung geführt dass der Angeklagte bereits, zur Zeit der Anmeldung des Patentinhabers, die Erfindung in Benutung genommen, oder doch die zur Benutzung erforderlichen Anstalten getroffen hatte.

Das Gegentheil hat allerdings der Zeuge Koppe bekundet. Derselbe war früher bei dem Angeklagten Werkmeister und sagte aus: Ausgang Februar oder Anfang März, 1880, habe sich der Angeklagte einen patentirten Brenner von Schwintzer und Græff durch Vermittelung des Fabrikanten Hugo Kœppen verschafft, und
220 nach diesem Modelle angefangen Mitraileusenbrenner mit flache Ueberdachung anzufertigen. Vorher habe er solche überhaupt nicht hergestellt, so wenig wie die von ihm zu deren Herstellung benutzten Schnitte und Stempel. Zeuge Kœppen hat es bestättigt dass der Angeklagte ihm am 3 März, 1880, den Auftrag ertheilt habe einen patentirten Brenner für ihn holen zu lassen; er behauptet jedoch, der Angeklagte habe ihm jedoch vorher einen von ihm selbst angefertigten Mitraileusenbrenner mit flacher Ueberdachung gezeigt, und ihm gesagt er wolle seinen Brenner mit dem patentirten vergleichen. Der commissärisch vernommene Zeuge Habermann, der bei dem Angeklagten bis zum November, 1880, gearbeitet hat, bekundet, seiner Erinerung nach, habe Hecht
221 schon im November, 1879, näher könne er die Zeit nicht angeben, die ersten Einrichtungen, resp. Werkzeuge, zur Herstellung der flachen Ueberdachung seines Mitraillenbrenners—Stempels und Platte—angefertigt. Der Zeuge Schmidt deponirte eidlich er habe bei dem Angeklagten bereits im October, 1879, Apparate zur Herstellung der fragl. Brenner hergestellt. Kœppen hat zugegeben dass diese Apparate—Stempel und Platte—einem andern als diesem Zwecke nicht dienen könnten. Seine den Angeklagten beslastenden Aussagen erscheinen den übrigen Zeugenaussagen gegenüber unglaubwürdig. Diese Unglaubwürdigkeit wird dadurch verstärkt dass er sich, wie er selbst zugesteht, mit dem Angeklagten in Differenzen befindet.

222 Nach allem was der Gerichtshof für bewiesen erachtet hat, ist thatsächlich festgestellt, einmal:

Dass der Angeklagte, zu Berlin, nach den 12 October, 1880, den Gegenstand der Erfindung betreffend die flache Ueberdachung der Räume zwischen den Dochtröhren von Mitraileusenbrennern auf welche der Firma Schwintzer und Græff unter dem 14 November, 1879, ein Patent ertheilt war, wissentlich ohne Erlaubniss des Patentinhabers gewerbsmässig hergestellt und in Verker gebracht hat, §§ 34 und 4, Reichspatentgesetz vom 25 Mai, 1877. Andererseits ist jedoch ferner thatsächlich festgestellt.

Dass der Angeklagte bereits vor dem 13 November, 1879, also zur Zeit der Anmeldung des Patentinhabers im Inlande die fragl. Erfindung in Benutzung genommen, namentlich die zur
223 Benutzung erforderlichen Veranstaltungen getroffen hatte. § 4, *eodem.* Ihm gegenüber tritt daher die Wirkung des Schwintzer Græffschen Patentes nicht ein, er mutste demzufolge freigesprochen werden. Der Kostenpunkt ist nach § 499, St. P. O., bestimmt.

(Gez.) FLEISCHMANN.
KANDELHARDT.
PAULITZKY.
BRAUSEWETTER.
LEUSCHNER.

Ausgefertigt:

Berlin, den 7 Juni, 1886.

[Seal Kön. Preuss. Landgericht, Berlin.]

LIDCHER,
Gerichtsschreiber der I. Straffkammer.

Dieses Gerichtserkenntniss und Bestätigung meiner Berechtigung zur Anfertigung der vom Herrn Schwintzer & Græff dort angemeldeten Patentes, zur Anfertigung von Diamantbrennern, übergebe ich Herrn Emile Bœrsh, in San Francisco, zur Wehrung meiner Rechte.

Berlin, d. 12ten Juni, '86.

W. H. HECHT.

[Stamps and cancellation marks.]

Vorstehende eigenhändige Unterschrift der mir bekannten Verfügungs berechtigten Herrn W. H. Hecht, beglaubigt.

Berlin, den 12ten Juni, 1886.

GERTE BERTHOLDE,
Bz.-Vorsh. d. 121 *Stdt.*

[Cancellation mark.]

Ausfertigung:

Seen for the above signature and seals.
Berlin, June 29, 1886.

[Seal Consulate General of the United States, Berlin.]

F. RAINE,
Consul General of the United States of America,
Berlin, German Empire, G.

No. 416. Rec'd fee, $2.00.

221 F II[s], 779, '80. S. K. I., 3709.

In the name of the King.

In the matter of the criminal prosecution against Wilhelm Herrmann Hecht, turner and lamp manufacturer, of Steglitz, for an infringement of the patent law, the first criminal division of the roval district court No. 1, at Berlin, in its session of March 1st, 1882, whereat were present—

1. Fleischmann, councilor of district court.
2. Kandlehardt, " " "
3. Brausewetter, " " "
4. Paulitzky, " of county court.
5. Leuscher, assessor of the court.

Sitting as judges:

Foren, assessor of the court on behalf of the attorney general's office.

Kornicki, referendary, acting clerk of court—

Adjudges and finds the defendant, Wilhelm Herrmann Hecht, turner and manufacturer of lamps, a native of Cottbus, born January 13, 1837, Protestant by religion, not guilty of a violation of the patent law; charging the state treasury with the costs of the proceedings herein—

Upon the ground as follows:

225 Messrs. Schwintzer & Graeff, lamp manufacturers of this city, had on the 13 November, 1879, applied for letters patent at the imperial patent office upon "flat roofing (or cap) of the Mitrailleuse burner," and they obtained in pursuance thereof under No. 1062, a patent d. d. November 19, 1879, wherein was designated as subject of the patent "the flat roofing of the spaces between the wick tubes of the Mitrailleuse burner."

The defendant likewise applied for a patent on March 30, 1880, for "Mitrailleuse burners which contain on their upper ends wick tubes half ways rimmed;" but on the 12 of October, 1880, he was notified that "wick tubes half ways rimmed" were covered already by the patent issued to Schwintzer & Graeff.

The defendant, nevertheless, sold, on December 20, 1880, to the firm of Neske & Springmann six burners by him manufactured, which, as the firm of Schwintzer & Graeff alleges, were an imitation of the patent awarded to them.

The aforesaid facts have been substantiated by the letters patent, the information of the imperial patent office, the sworn-to opinion of the lamp manufacturer, Graeff, and the admission of the defendant.

The parties thus damaged in due time moved a criminal prosecution herein.

The defendant does not allege that he ever obtained from
226 the firm of Schwintzer & Graeff permission to manufacture under their patent; on the contrary, he denies that the "Mitrailleuse burner" by him manufactured can be considered an imitation of the patented article, it being materially different therefrom. He furthermore alleges that even if such were the case he

would be protected by § 5 of the German patent law, inasmuch as he had already prior to the application for the patent in question been employed in manufacturing that kind of "Mitrailleuse burners," particularly, however, in constructing the apparatus (dies and cuts) used by him in accordance with his own ideas.

I.

The court has arrived at the conclusion that "the flat roofing" on the "Mitrailleuse burners," as manufactured by defendant herein, is materially identical with the invention patented to Schwintzer & Graeff, sub-No. 1062.

To Hecht's burners there is affixed, just as to those of Schwintzer & Graeff, a roofing of the spaces between the wick tubes, only does the same not enclose the tubes all around, but only half ways from the outer side of the burner.

This resulted in a comparison of both models, in accordance with the official information of the imperial patent office of October 30th, 1880, and the sworn-to opinion of the experts Preetz & Wilop.

227 The said difference between both burners does not consist in the principle. The patent burner answers chiefly the purpose to prevent an accumulation of soot between the tubes when a scraping of the wick becomes necessary, and also to accord them a greater relative firmness. Hecht's burners accomplished this only in a lesser degree. Herein the information of the imperial patent office October 30, 1880, and the opinion of Preetz and Wilop coincide. Wilop deposed that, though a similarity of the means existed, the purpose of the patented invention was in a lesser degree accomplished by Hecht's burner, while, on the other hand, through Hecht's burners more air was adduced to the flame, as is the case with the patented article. This, however, does not appear to be a material difference and is not in controversy with the expert opinion of the imperial patent office and that of Preetz, namely, that the similarity between the two burners is so great that the one seems to be an imitation of the other.

Schwintzer & Graeff applied for a patent on November 13, 1879, upon their invention. On the 12th of October, 1880, the defendant, upon application, was refused a patent for his burner. Notwithstanding that, he sold on December 30th, 1880, to Neske & Springmann six burners. He would therefor be punishable for

228 knowingly infringing upon a patented invention were he not protected by § 5 of the patent law.

II.

The total result of the proofs adduced has brought the court to the conclusion that the defendant at the time of the application of the patentees was making use of the invention, or, at least, had made the necessary preparations for its use.

Witness Koppe, however, testified to the contrary. He was formerly a foreman of the defendant, and alleges that the defendant

had in the latter part of February or at the commencement of March, 1880, procured through manufacturer Hugo Köppen a newly patented burner of Schwintzer & Graeff, and by the use of that model commenced to manufacture "Mitrailleuse burners" with "flat roofing." Prior to that time he manufactured neither such nor the "cuts and dies" necessary for their manufacture.

Witness Koeppen has established that the defendant on March 3d, 1880, ordered him to send for a patented burner on his behalf; admits, however, that defendant has prior thereto shown him a "Mitrailleuse burner" with "flat roofing" as manufactured by him, and that he had told him he wanted to compare his burner with the one patented.

Witness Nabermann, who worked for defendant up to November, 1880, and whose testimony was taken by way of commission, alleges that, as near as he is able to recollect, Hecht had already in
229 November, 1879, with more accuracy he cannot fix the date, made his preparations respecting "tools, dies, and plate" for the manufacture of "flat roofing" of his "Mitrailleuse burners."

Witness Schmidt deposed under oath that at defendant's workshop as early as October, 1879, he worked at the apparatus for the manufacture of the burner in question.

Koeppen admitted that these apparatus, dies, and plate cannot be used for any other purpose as the one mentioned. These declarations against the defendant as compared with those of the other witnesses did not appear credible. This incredibi*bil*ity is heightened by the fact that, according to his own admission, differences exist between himself and defendant.

After all, what the court has considered as proven it has been actually established—

First. That the defendant has knowingly and without permission of the patentees manufactured and sold at the city of Berlin subsequent to October 12, 1880, the subject of said invention, namely, "the flat roofing of the spaces between the wick tubes of the Mitrailleuse burners," for which a patent had been awarded on November 14, 1879, to the firm of Schwintzer & Graff.

§§ 34 and 4 of the Imperial Patent Law of May 25, 1877.

On the other hand, it has been actually established that
230 the defendant has already prior to November 14, 1879—that is to say, at the time of the application by the patentees for and within the State—made use of the invention in question, especially, however, had made the necessary preparations for its use. § 4, *codem*.

Thus Schwintzer & Graeff's patent is of no effect against him and he had to be acquitted accordingly. The costs are regulated by § 499, N. P. O.

(Signed) FLEISCHMANN.
KANDELHARDT.
PAULITZKY.
BRAUSEWETTER.
LEUSCHNER.

Berlin, June 7, 1886.

[SEAL.] BECHER, *Clerk I Criminal Division.*

The within judgment and confirmation of my right for the manufacture of "Diamond burners" as patented to Messrs. Schwintzer & Graeff I herewith surrender to Mr. Emil Boesch, of San Francisco, for the protection of my said right.

Berlin, June 12, 1886.

W. H. HECHT.

I certify that the signature of Mr. W. H. Hecht hereinbefore is genuine.

Berlin, June 12, 1886.

(Stamp duty.)

[OFFICIAL SEAL.]

GARTEN BERTHOLD,
Dist. Off. of 121 *Dist.*

Certificate of U. S. Consul General F. W. Raine, at Berlin.
No. 416.
Rec. fee, $2.00.
(Consular seal.)

231 STATE OF CALIFORNIA, } ss:
City and County of San Francisco, }

Henry Hasbach, being by me duly sworn, deposes and says: I am conversant with both the English and German languages, and have made the foregoing translation from German into English. The same is a true and correct translation of the German original and the whole thereof and as literal as the heterogeneousness of the idioms aforesaid permit.

HENRY HASBACH.

Subscribed and sworn to before me this 24th day of September, 1887.

[Seal John F. Lyons, Notary Public, City & Co. of San Francisco, Cal.]

JNO. F. LYONS,
Notary Public.

232 In ten days return to Jno. L. Boone, Jno. J. Scrivner. Law offices of Scrivner & Boone, rooms 12, 13, 14 No. 320 California street, San Francisco, Cal.

233 U. S. Circuit Court, Dist. of Cal.

GRAFF
v.
BOESCH. } No. 4107.

RESPONDENT'S EXHIBIT 4. S. C. H., Examiner.

5681.

BERLIN, *den 15ten October*, 1886.

Rechnung für Herr Emile Boesch, San Francisco, von W. H. Hecht zahlbar gegen Casse mit 4 %, sandte auf Ihre Order für Ihre Rechnung und Gefahr, durch Vermittellung d. Herrn Brasch & Rothenstein, E. R. 586–590, 5 *Kisten, San Francisco.*

				Mark.
√√	100 St'ck	Diamantbr. 18··· mit Dochtrhr. Verz.	1.73	173.00
√√	100 "	" 30··· mit d. mit d.	2.70	270.00
√	16 "	Germania 20··· mit d. mit d.	2.00	32.00
√	20 "	Cylinder zu 20···	0.20	4.00
√	200 "	Dochtzangen	0.09	18.00
		Kiste 586:		
√	36 Dtz.	Cylinder zu 18··· Diam't	1.80	64.80
		Kiste 587:		
√	$5\frac{2}{3}$ "	Cylinder zu 18··· d.	1.80	10.20
√	$15\frac{1}{2}$ "	" zu 30··· d.	3.60	55.80
		Kiste 588:		
√	19 "	Cylinder zu 30··· d.	3.60	68.40
		Kiste 589:		
√	$7\frac{1}{6}$ "	Cylinder zu 30··· d.	3.60	25.80
√	$4\frac{1}{8}$ "	helle Einsatz Vohen. zu 30··· (5, 4)	----	22.50
		Kiste 590:		
√	5 St'ck	Kisten, 586, 10.00; 587, 7.00; 588, 7.00; 589, 7.00; 590, 7.00		38.50
				782.00
	4 %			31.30
				751.20
	Beglaubigung der Facturen			10.75
	Summa		M'k	761.95

W. H. HECHT.

234 Für Fabrikanten oder Eigenthümer:

Ich, W. H. Hecht, aus Berlin, erkläre hiermit feierlich und wahrheitsgetreu, dass ich der Fabrikannt der in der beigefügten Factura angegebenen und näher beschriebenen Güter, Waaren und Fabrikate bin; dass besagte Factura in jeder Beziehung wahrheitsgetreu ist; dass sie eine genaue Angabe des wirklichen Marktpreises aller solcher der besagten Waaren, Güter und Fabrikate enhält, welche einem *ad valorem* Zollsatz unterworfen sind, oder welche einen solchen Zoll zahlen, der laut Gesetz, nach dem Werth des Längenmaasses oder irgend eines anderen näher specificirten Gewichtes oder Maasses zur Zollabgabe eingeschätzt und besteuert wird, und zwar

des Marktpreises, welcher zu der Zeit massgebend war, als die Waare fabricirt oder angeschaft wurde; ebenso dass sie eine genaue Angabe der wirklichen Quantität besagter Waaren, Güter und Fabrikate und aller dazu kommenden Spesen enthält; dass keine Sconti, Abzüge und sonstige Vergünstigungen in besagter Factura angegeben sind, welche nicht wirklich dem Käufer erlaubt wurden; dass keine andere Factura an irgend Jemand ausgestellt wurde oder noch ausgestellt werden wird, welche von der hier vorgelegten Factura verschieden ist. Ich erkläre ferner, dass besagte Güter, Waaren und Fabrikate in den Hafen von San Francisco, in den Vereinigten Staaten von Nordamerika, zur Verzollung eingeführt werden sollen.

Vierfach declarirt zu Berlin, heute den 16ten October, 1886.

W. H. HECHT,
Inhaber der Firma W. H. Hecht.

Duplicat.

U. S. Consulate General, Berlin, German Empire.

No. 5681.

Date: Berlin, 16th October, 1886.

Consignor: W. H. Hecht, Berlin.

Consignee: Emile Boesch, San Francisco.

Port of entry: New York.

In Bond to ——.

Destination: San Francisco.

Kind of goods: Glass u. Metalwaaren.

Value: 761.95 Germ. Marks.

I, the undersigned, —— ——, consul general of the United States, at Berlin, German Empire, do hereby certify that, at my office, on this 16th day of October, A. D. 1886, the within invoice numbered —, in which are mentioned and described certain Glass u. Metalwa-ren, amounting, with the charges thereon, to the gross sum of —— Germ. Marks, was produced to me by W. H. Hecht, in person, the manufacturer of the goods, wares, and merchandise therein mentioned, who thereupon declared in writing, in my presence, that it was intended to make entry of said goods, wares, and merchandise at the port of San Francisco, in the United States of America.

Seal Consulate General of the United States, Berlin.

I do further certify that I am satisfied that the person making the declaration hereto annexed is the person he represents himself to be, and that the actual market values, or wholesale prices of the goods, wares, and merchandise described in the said invoice, in the principal markets of the country and at the time of exportation, are correct and true, excepting as changed by me and set forth in the column of consular corrections of estimates.

Witness my hand and seal of office, at Berlin, the day and year aforesaid.

W. PERCY TILGHMAN,
Consul General of the United States of America.

Fee received, doll., 2.50.

235 *Providentia Frankfurter Versicherungs-Gesellschaft zu Frankfurt a. Main.*

Begebenes Grund-Capital, fl. 10,000,000 = M. 17,142,857
Capital-Reservefonds ..... " 966,000

Wir bescheinigen hierdurch den Herren Brasch & Rothenstein, zu Berlin, dass wir den Genannten auf Grund ihrer General-Polize No. 5351, und zu den Bedingungen derselben unter laufender No. a. 1056, am 2ten November, 1886, E. B. 586–'90, 5 Kisten Metall- und Glas-waaren, 668 Kilo., im Werthe von M. 850, für die Reise von Berlin per Bahn nach Hamburg, von der per Dampfer Roman nach New York, und von der per Bahn nach San Francisko, versichert haben, und zwar zur Bedingung „frei von Beschädigung, resp., Bruch ausser im Strandungsfalle."

Berlin, den 7ten November, 1886.

Die General-Agentur der „Providentia" Frankfurter Versicherungs-Gesellschaft.

[Stamp General-Agentur Providentia, Berlin.]

[Signature illegible.]

Obige Bescheinigung wurde in drei gleichlautenden Exemplaren ausgefertigt, welche aber nur für eine Gültigkeit haben.

(Here follows bill of lading marked pp. 236–237.)

238 In the United States Circuit Court, Ninth Circuit, Northern District of California.

ALBERT GRAFF, Complainant,
vs.
EMILE BOESCH, Defendant.

To the honorable the justices of said circuit court:

The respondents above named respectfully represent to your honors that since the hearing and filing of the interlocutory decree in the above-entitled action certain newly-discovered matters of evidence have come to the knowledge of your petitioners which, in your petitioner's opinion, would have materially affected the decision and decree in said case if it had been presented to the court. Proof that such evidence does actually exist is herewith presented in the form of affidavits and made a part hereof; also the affidavits of your petitioners and their solicitor to the facts relied upon to show why such evidence was not produced at the trial of said cause.

Your petitioners further say that every effort possible was made by Martin Bauer, the only defendant in the jurisdiction of the court during said trial, to obtain evidence of the two years' prior use, but that he failed to find the parties who knew of the facts; that said
239 Bauer made personal inquiries in all the leading lamp stores in San Francisco and wrote letters to Eastern manufacturers regarding said question of prior use, but was unable to learn anything in regard thereto until the return of Emile Boesch to San Francisco; that said Bauer was diligent in his search for said evidence, and that said newly-discovered evidence could not under the circumstances have been obtained at an earlier date.

Wherefore your petitioners pray that the judgment and decree heretofore rendered and entered in this cause be set aside and that a rehearing of said cause be granted, with leave to defendants to file an amended answer.

SCRIVNER & BOONE,
Solicitors for Defendants.

JOHN L. BOONE, *Of Counsel.*

240 STATE OF CALIFORNIA, }
City and County of San Francisco, } *ss:*

Martin Bauer, being duly sworn, deposes and says that he is one of the petitioners named in the above-entitled action; that he has read the above and foregoing petition and knows the contents thereof; that the same is true, of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters that he believes it to be true.

MARTIN BAUER.

Subscribed and sworn to before me this 8th day of December, 1887.

[Seal John E. Hamill, Notary Public, City & Co. of San Francisco, Cal.]

JOHN E. HAMILL,
Notary Public.

241 [Endorsed:] No. 4107. Dep't —. U. S. circuit court, northern district of California. Albert Graff, plaintiff, *vs.* Emile Boesch *et al.*, defendants. Petition for rehearing. Services of the within petition admitted and copy received this 8th day of December, 1887. —— ——, attorneys for plaintiff. Filed —. —— ——, clerk, by —— ——, deputy clerk. Scrivner & Boone, No. 320 Cal. street, San Francisco, Cal., attorneys for defendants.

242 In the United States Circuit Court, Ninth Circuit, Northern District of California.

ALBERT GRAEFF *et al.*, Complainants, }
vs.
EMILE BOESCH *et al.*, Respondents. }

Conrad Petsch, being duly sworn, deposes and says that between the years 1868 and 1885 he was engaged in the business of manu-

facturing brass goods in the city of New York, State of New York; that during said period of time he moved his place of business several times; that in the month of December, 1880, and January, 1881, his place of business was at the corner of Franklin and Center streets, in New York city, and that at said date and at said place Jacob and John Kaschau, who were then engaged in the lamp business, under the name of Kaschau Brothers, at 104 Center street, New York, presented to affiant a lamp burner which they called a Mitra lleuse lamp burner, which they told affiant had been recently invented in Germany and imported to this country, and de-
243 sired affiant to make an estimate on the tools necessary to manufacture said burners, and also for an estimate as to what affiant could make said burners for. About said time affiant saw in the possession of said Kaschau Bros. a large number of said Mitra-lleuse burners. Affiant examined said Mitra-lleuse burners closely and knows how they were constructed, and says that the burners which he then saw on sale at said Kaschau Bros. in New York and the burner which was presented to affiant by said Kaschau Bros. on which to make an estimate as aforesaid at said time and place above mentioned had a cap on the upper ends of the burner tubes; that affiant has been in the employ of Albert Graeff, complainant herein, in this city for some months last past, and when employed by him affiant informed said A. Graeff of the facts above recited before the decision in this suit, but that he never said anything to the defendants herein or either of them about his said knowledge until Sunday, October 9th, 1887. Affiant says that in his own personal knowledge said Mitra-lleuse lamp burner with a cap on the upper end of the tubes was on sale in New York
244 city in the month of January, 1881, and if placed on the witness stand he can give names, dates, and places with sufficient particularity to establish said facts.

CONRAD PETSCH.

Subscribed and sworn to before me this 11th day of October, A. D. 1887.

[Seal James L. King, Notary Public, City & County of San Francisco, Cal.]

JAMES L. KING,
Notary Public.

245 [Endorsed:] No. —. U. S. circuit court, north. dist. of California. Albert Graeff *et al. vs.* Emile Boesch *et al.* Affidavit of Conrad Petsch. Scrivner & Boone, sol. for defendants.

246 In the United States Circuit Court, Ninth Circuit, Northern District of California.

ALBERT GRAEFF, Complainant,
vs.
EMILE BOESCH *et al.*, Defendants.

STATE OF CALIFORNIA,
City & County of San Francisco, } *ss:*

Emile Boesch, being duly sworn, deposes and says that he is one

of the defendants in the above-entitled case; that he has been engaged in the business of manufacturing and selling lamps and lamp articles in said city and county of San Francisco for the past eighteen years, and that, as a result of his said business, he has built up the present business of E. Boesch & Co. to its present condition; that he is familiar with said business in all its details, and has personally managed and superintended it during said period of eighteen years with the exception of the short time that he has been in partnership with Martin Bauer, his partner and codefendant herein; that
247 said Martin Bauer be-ame a partner in said business in the year 1885.

Affiant further says that owing to ill health he left the State of California on or about the 20th day of September, 1886, before the commencement of this action, and went to Europe, where he could secure proper medical attendance, and that he did not return to this State until after the hearing and trial of the above-named action, and that he was consequently absent from the State during the entire time of said trial; that his said partner, Martin Bauer, was not familiar with the facts of defense involved in said action, and that, owing to the long time it took affiant to communicate with said Bauer and affiant's attorneys and the difficulty in getting a proper explanation of the nature of said action and what defenses could be made thereto, the defense of two years' prior use was not made.

That as soon as he returned to San Francisco and learned the condition of said case he immediately took steps to secure proof of said defense.

Affiant further says that no one in San Francisco, so far as he is aware, had any knowledge of the facts constituting said defense of prior use.

248 Affiant further says that said defense could not under the circumstances have been sooner made.

EMILE BOESCH.

Subscribed and sworn to before me this 5th day of December, A. D. 1887.

[Seal James L. King, Notary Public, City & County of San Francisco, Cal.]

JAMES L. KING,
Notary Public.

249 [Endorsed:] No. —. U. S. circuit court, north. dist. of California. Albert Graff, complainant, *vs.* Emile Boesch *et al.*, defendant-. Affidavit of Emile Boesch.

250 In the United States Circuit Court, Ninth Circuit, Northern District of California.

ALBERT GRAFF
vs.
EMILE BOESCH *et al.*

STATE OF CALIFORNIA,
City and County of San Francisco, } *ss:*

Martin Bauer, being duly sworn, deposes and says that he is a

member of the firm E. Boesch & Co., the defendant above named; that he has only been a member of said firm for a period of two years, and that his part of the business consists in looking after the factory and inside business of said firm; that his partner, E. Boesch, left the State of California on the 20th day of Sept., 1886, and went to Europe on account of his health, and during his absence affiant was left alone to attend to all the business of said firm; that affiant knew but little about the purchase and shipment of the Mitraelleuse burners involved in this action, and did not know anything whatever about any prior use thereof until the return of said E. Boesch. Affiant says he made inquiries amongst all lamp dealers in San Francisco about such prior use and diligently sought for
251 evidence of such prior use, but found no one in San Francisco that knew much about said Mitraelleuse burners.

MARTIN BAUER.

Subscribed and sworn to before me this 7th day of December, A. D. 1887.

[Seal John E. Hamill, Notary Public, City & Co. of San Francisco, Cal.]

JOHN E. HAMILL,
Notary Public.

252 [Endorsed:] No. —. U. S. circuit court, north. dist. of Cal. Albert Graff *vs.* Emil Boesch *et al.* Affidavit of Martin Bauer.

253 UNITED STATES OF AMERICA, } ss:
Southern District of New York, }

Bennett B. Schneider, being duly sworn, says that he resides in the township of South Orange, county of Essex and State of New Jersey; that deponent is engaged in the business of selling lamps, lamp burners, and lamp fixtures, at wholesale and retail, at No. 37 Park place, in the city, county, and State of New York; that deponent has been engaged in such business for twenty-five years last past, continuously; that some time during the fall or summer of the year 1879 deponent imported from Germany several lamp burners known as the "Mitrailleuse burner," one of which said burners, so imported, is hereto annexed and marked Exhibit "A;" that each and all of said burners imported by deponent as aforesaid were constructed upon the same principal and were exactly similar in all respects to said Exhibit "A" hereto annexed and to each other; that each and all of said burners consisted of a number of circular wick tubes of the same length and arranged in a circle with each tube parallel to all of the others and equidistant from the axis of said burner; that each of said wick tubes contained or car-
254 ried a small r-und wick, which was raised or lowered by means of a movable frame, which frame was adjusted by means of a rack and pinion, said rack being attached to a plate at the bottom of said movable frame, as shown by said Exhibit "A."

That said burners also had a flat brass band running around the outside of said wick tubes, at their upper ends, and to which each of said wick tubes was fastened, which band formed a brace or sup-

port for the upper ends of said wick tubes, as shown by Exhibit "A;" that each of said burners also had a circular disk mounted upon a post in the centre of said circle of wick tubes, which disk was elevated a short distance above the tops or upper ends of said wick tubes, having the plane of said disk at right angles to the axis of said burner, the said disk acting as a damper or spreader and changing the direction of the current of air which came upward through the centre of said circle of wick tubes and forcing the same outward into the flame; that the said disk and post are not shown in Exhibit "A," the same having been lost.

BENNETT B. SCHNEIDER.

Sworn to before me this 17th day of November, 1887.

255 [Seal Frederick M. Haviland, Notary Public, New York.]

F. M. HAVILAND,
Notary Public (201), *City and County of New York*,
(22 *Park Place*).

256 UNITED STATES OF AMERICA, }
Southern District of New York, } *ss:*

Jacob Kasschau, of the city, county, and State of New York, being duly sworn, says that at all the times hereinafter mentioned prior to July 1st, 1881, he was a member of the firm of Kasschau Brother and Company, which firm did business in said city of New York as manufacturers and importers of lamps, lamp fixtures, lamp burners, and brass goods; that during the month of August, 1880, the said firm of Kasschau Brother and Company imported a number of lamp burners from Berlin, Germany, where such burners were manufactured by one Hugo Koepen, and which were known by the name of the "Mitrailleuse" burner, and that said firm sold all of said burners prior to July first, 1881, in the United States of America; that between September 1st, 1880, and July 1st, 1881, said firm of Kassachau Brother and Company also imported and sold in the United States of America several other lots of said "Mitrailleuse" burners which they also purchased of said Hugo Koepen; that all of said "Mitrailleuse" burners consisted of a number of small circular wick tubes of the same length and size arranged in a circle with each tube parallel to all of the others, each of which wick tubes contained or carried a small round wick which was raised or lowered by means of a movable frame; that all of the intermediate spaces between the upper ends of said wick tubes were covered by a flat brass cap or covering, which cap or covering formed a
257 band running around the outside of said circle of wick tubes at their upper ends and had brass bars or projections extending towards the centre of said circle of wick tubes and completely covering the intermediate spaces between all of said wick tubes at their upper ends and forming a support or brace for the upper ends of said wick tubes, and also controlling the direction of the current of air which passed upward through the centre of said wick tubes to feed the flame; that the said burners also had a circular disk mounted upon a post in the centre of said circle of wick tubes, which

disk was elevated a short distance above the tops or upper ends of said wick tubes and acted as a spreader or damper, changing the direction of the current of air which came upward through the centre of said circle wick tubes and forcing the same outward into the flame; that the lamp burner hereto annexed and marked Exhibit "A" is one of the said "Mitrailleuse" burners hereinbefore referred to as imported by said firm of Kasschau Brother and Company from Berlin, Germany, and by said firm sold in the United States of America prior to July 1st, 1881, and that all of said "Mitrailleuse" burners herebefore referred to as having been imported and sold in the United States of America by said firm of Kasschau Brother and Company were exactly similar in all respects and particulars to said Exhibit "A," except that a part of said burners consisted of nine wick tubes instead of twelve wick tubes.

JACOB KASSCHAU.

Sworn to before me this 21st day of November, 1887.

[Seal Theodore Feldstein, Notary Public, New York.]

THEODORE FELDSTEIN,
Notary Public, N. Y. Co.

258 UNITED STATES OF AMERICA, }
Southern District of New York. }

Christian Huebernett, being duly sworn, says that he resides in the city, county, and State of New York; that he came from Germany to the United States of America and arrived in the said city of New York August 19th, 1880; that deponent brought with him at that time to the said city of New York several lamp burners, all of which were known as the Mitrailleuse burner, which burners were delivered to deponent in Germany by one August Frichn, who requested deponent to deliver same to Kasschan Brother and Company, of New York city aforesaid, and that upon deponent's arrival in said city of New York, as aforesaid, deponent delivered
259 said burners to said firm of Kasschan Brother & Company; the each of said burners consisted of a number of small circular wick tubes of *a* the same length and size arranged in a circle, with each tube parallel to all of the others, each of which wick tubes contained or carried a small, round wick, which was raised or lowered by means of a movable frame; that all of the intermediate spaces between the upper ends of said wick tubes were covered by a flat brass cap or covering, which cap or covering formed a band running around the outside of said circle of wick tubes at their upper ends and had brass bers or projections extending towards the centre of said circle of wick tubes and completely covering the intermediate spaces between all of said wick tubes at their upper ends and forming a support or brace for the upper ends of said wick tubes, and also controlling the direction of the current of air which passed upward through the centre of said wick tubes to feed the flame; that the said burner also had a circular disk mounted upon
260 a post in the centre of said wick tubes, which disk was elev-ed a short distance above the tops or upper ends of said wick

tubes and acted as a spreader or damper, changing the direction of the current of air which came upwards through the centre of said wick tubes and forcing the same outward into the flame; that between August 19th, 1880, and July 1st, 1881, deponent was frequently in the store of said firm of Kasschan Brother and Co., at No. 138 Centre street, in said city of New York, and saw in said store on sale considerable numbers of said "Mittrailleuse" burners constructed as hereinbefore described; that deponent saw said burners and handled and carefully examined the same and took particular notice of the construction of the same; that deponent has seen the lamp burner annexed to the affidavit of Jacob Kasschan, dated November 21st, 1887, and hereto annexed, and that said lamp burner thereto annexed and marked Exhibit "A" is similar in all respects and particulars to the "Mittrailleuse" burners hereinbefore
261 referred to, except that some of said burners consisted of nine instead of twelve wick tubes.

CHRISTIAN HUEBBINETT.

Sworn to before me this 21st day of November, 1887.

[Seal Theodore Feldstein, Notary Public, New York.]

THEODORE FELDSTEIN,
Notary Public, N. Y. Co.

262 In the United States Circuit Court, Ninth Circuit, Northern District of California.

ALBERT GRAFF
vs.
EMILE BOESCH *et al.*

STATE OF CALIFORNIA,
City and County of San Francisco, } *ss:*

John L. Boone, being duly sworn, says that he is a member of the law firm of Scrivner & Boone and as such he has had the control and management of the above-entitled case; that Emile Boesch, the principal member of the defendant firm, was absent from the State during the entire pendency of said suit up to the time of trial, and he was unable to get any information regarding the defense except from Emil Bauer, the other member of said firm; that said Bauer did not seem to know anything about the matter in litigation; that affiant did not know and had no means of knowing to what extent the lamp described in complainant's bill of complaint had been used in the United States until the return of said Boesch; that as soon as he learned that there was proof of such prior use he took immediate steps to obtain it.

JNO. L. BOONE.

Subscribed and sworn to before me this 7th day of December, 1887.

[Seal John E. Hamill, Notary Public, City & Co. of San Francisco, Cal.]

JOHN E. HAMILL,
Notary Public.

263 [Endorsed:] No. 4107. U. S. circuit court, north. dist. of Cal. Albert Graff *vs.* Emile Boesch *et al.* Affidavit of Jno. L. Boone. Petition for rehearing and affidavits of John L. Boone, Conrad Petsch, Emile Boesch, Martin Bauer, Jacob Kasschau, Christian Huebernett, and Bennett B. Schneider. Filed Dec. 9, 1887. L. S. B. Sawyer, clerk, by F. D. Monckton, deputy clerk.

Receipt of copies of within petition and affidavits admitted this 8th day of December, 1887, and service of duplicates of exhibits *are* hereby waived; all other objections specially reserved.

LANGHORNE & MILLER,
Solicitors for Complainants.

264 At a stated term, to wit, the February term, A. D. 1889, of the circuit court of the United States of America of the ninth judicial circuit in and for the northern district of California, held at the court-room, in the city and county of San Francisco, on Monday, the 21st day of May, in the year of our Lord one thousand eight hundred and eighty-eight.

Present: The Honorable Lorenzo Sawyer, circuit judge; Honorable George M. Sabin, U. S. district judge, district of Nevada.

A. GRAFF *et al.*
v.
E. BOESCH *et al.* } No. 4107.

This cause, heretofore argued and submitted to the court for consideration and decision upon the petition for a rehearing herein, having been duly considered, it is ordered that said petition be, and the same hereby is, denied at petitioners' cost.

265 [Endorsed:] No. 4107. U. S. circuit court, ninth circuit, northern district of California. A. Graff *et al. v.* E. Boesch *et al.* Certified copy order denying petition for rehearing. Filed ——, 188–. ——, clerk, by ——, deputy clerk.

I hereby certify that the foregoing is a full, true, and correct copy of an original order made and entered in the above-entitled cause.

Attest my hand and the seal of said circuit court this 2nd day of October, A. D. 1889.

Seal U. S. Circuit Court, Northern Dist. Cal.

L. S. B. SAWYER, *Clerk*,
By F. D. MONCKTON, *Deputy Clerk*.

Endorsed on cover: N. California C. C. U. S. No. 1408. Emile Boesch and Martin Bauer, appellants, *vs.* Albert Graff and J. F. Donnell. Filed October 18, 1889.

No. .....

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1889.

No. 1408.

EMILE BOESCH
AND
MARTIN BAUER,
Appellants.

vs.

ALBERT GRAFF
AND
J. F. DONNELL,
Respondents.

Appeal from the Circuit Court of the United States for the Northern District of California.

J. J. SCRIVNER,
Solicitor for Appellants.

Filed ..... *A. D. 1889*

..... *Clerk.*

By ..... *Deputy Clerk.*

SAN FRANCISCO:
R. R. PATTERSON, PRINTER, 431 Montgomery Street, S. F.
1889.

1 IN THE

Supreme Court of the United States.

OCTOBER TERM, 1889.

No. 1408.

2 EMILE BOESCH
AND
MARTIN BAUER,
Appellants.

vs.

ALBERT GRAFF
AND
J. F. DONNELL,
Respondents.

Appeal from the Circuit Court of the United States for the Northern District of California.

3

STATEMENT OF THE CASE.

In the year 1885 Emile Boesch, one of the respondents herein, who is a large manufacturer of lamps and reflectors in San Francisco, California, was compelled to travel in Europe for his health, leaving his quasi-partner, Martin

4 Bauer, his co-respondent herein, in charge of the San Francisco business. While in Germany Boesch's attention was drawn to a lamp burner known as the Mitraelleuse burner, which was extensively made and sold in that country. This mitraelleuse lamp burner was a French invention and consisted of a number of small round wick-tubes arranged in a circle, and adapted to be raised and lowered simultaneously by means of a thumb wheel and suitable mechanism in the ordinary way of raising and lowering lamp
5 wicks. Each small round tube carried a wick, and the complete system of wicks when lighted formed a circular and powerful light. This lamp burner had been manufactured and sold for many years prior to the invention of Schwintzer & Graeff, hereinafter referred to.

Believing that these lamps would meet with ready sale in San Francisco, Mr. Boesch purchased from one W. H. Hecht, a manufacturer
6 of lamps and burners in Berlin, Germany, one hundred 16-wick burners of this character and shipped them to his San Francisco house where they were put on sale. They arrived in San Francisco about the 1st of January, 1886.

These lamp burners had a horizontal, ring-shaped cap or circular plate secured around the tops of the tubes, and the inner edge of the cap or plate was cut out in corrugations so that one-

7 half of each tube on the inner part of the circle was exposed, in other words the cap was what may be termed a half cap, extending from the circumferential center of each tube outward, *but not inward.*

After having sold four of these burners the respondents were notified by Graff, one of the complainants herein that the burner was an infringement on the United States letters patent No. 289,571, which was issued to Carl Schwintzer
8 and Wilhelm Graff, of Berlin, Germany, on the 4th day of December, 1883, which patent it was claimed had been assigned to and was owned by J. F. Donnell & Co., of New York City, and Albert Graff, of San Francisco, Cal.

Upon receiving this notification, respondents consulted their Attorney, and were advised to remove the caps, and sell the remainder in that condition, which they did

About one year after the first shipment was
9 received, to wit, about January 1887 (Boesch's test. Q. 23, page 24) another invoice of one hundred 16-wick burners, and one hundred 20-wick burners, with caps (Boesch test. Q. 24, page 24 and Q. 26, page 25) were received by respondents from Germany, from which lot they sold four 20-wick and six 16-wick burners, *with caps*, (Q. 46, page 26) after which respondents removed the caps of all they sold,

10 but most of them are still on hand (Q. 27 to 50 page 26.

Respondents therefore sold fourteen of these mitraelleuse burners with half caps, but they sold none with full caps (Boesch's testimony Q. 18, page 32, trans.) To show the good faith of the respondents in not wishing to infringe upon the letters patent in question, it appears from the testimony that some time after they were notified by Graff that the burners they
11 were selling were claimed to be infringements on complainants' patent, a member of the firm of McFadden and Hatton, an Eastern house sold and shipped to respondents one dozen mitraelleuse burners, *with caps*, that when respondents found that the burners thus purchased were infringements or rather were of the kind claimed to be infringements, they refused to accept them and so notified the firm of McFadden and Hatton, and on an order from said McFadden and
12 Hatton, respondents turned the burners over to Nathan and Company, a retail house in San Francisco. (Boesch's test. from Q. 89, page 29, to Q. 100 same page, also a X Q. 30, page to Q. 36, page 32, trans.)

COMPLAINANTS' LETTERS PATENT.

The letters patent sued on is numbered 289,-571, and is dated December 4th, 1883. The

13 patent contains three claims, the first two of which complainants insisted were infringed, until the case came on for final hearing in the Court below, but at the hearing counsel for complainants withdrew the charge of infringement as far as the second claim was concerned, leaving his case to rest on the first claim only.

This claim reads as follows: "1. In a lamp-"burner of the class described, the combination "with the guide-tubes, of a ring-shaped cap pro-
14 "vided with openings for the wicks, said cap "being applied to the upper ends of the guide-"tubes so as to close the intermediate spaces "between the same substantially as set forth."

It appeared in evidence that the patentees, Carl Schwintzer and Wilhelm Graff were residents of Germany, and that they had taken out a German patent for their alleged invention *before they applied for their United States patent.*

It further appeared (translation of Respond-
15 ents' Exhibit 1, pages 152, 153, and 154,) that W. H. Hecht, the manufacturer hereinbefore referred to as being the person from whom respondents purchased all their burners of this character, had been sued in the German Courts for infringing upon the German patent of said Schwintzer and Graff. That the German Court had decided that the burner manufactured by said Hecht, that is, with the half cap, was an

16 infringement upon the invention of Schwintzer and Graff. *But it appearing that said Hecht had manufactured his burners before Schwintzer and Graff applied for their German patent, under the patent laws of Germany he was privileged to continue the manufacture and sale of the burners without liability to the patentee,* consequently the suit was decided in favor of said Hecht, (see Respondents' Exhibit 1, page 152,) and Hecht was privileged under the German law to enjoy
17 the same privileges as the patentees Schwintzer and Graff, as far as the right to manufacture, use and sell the burners was concerned.

The testimony shows then that the respondents purchased all the mitraelleuse burners they ever had from said W. H. Hecht, who had been by the laws of Germany, thus invested with the right to manufacture, use and sell equal to that of the patentees.

The question then arises, Can an innocent
18 person who purchases from Hecht in Germany, in the ordinary course of trade, and who imports the burners into the United States, be prevented by a United States patent from selling them? The Judge of the Circuit Court said Yes! This we allege is error.

Suppose that instead of purchasing the burners from Hecht, the respondents had purchased them from Schwintzer & Graff, the German

19 patentees. Could they then be prevented by Schwintzer & Graff's, United States patent from selling them in the United States?

In the case of *Holiday* vs. *Matheson* 24 *Feb. Rep.*, 185 it was held that a purchaser in England from the English patentees had a right to sell the article so purchased in the United States without liability to the American patent of that English patentee.

This we claim is practically the present case.
20 *Hecht was not a licensee under the German patent.* He stood on the same footing under the German law that the patentees themselves did. The German law distributes the right and the privilege of making, using and selling a new invention to two classes of persons. 1st. to the inventor if he applies for and secures a patent on the invention, and 2d. to any person who makes and sells the articles before the patent is applied for. The rights of both of these
21 classes are based upon and emanate from the law. Hecht's right was not based on Schwintzer & Graff's German patent, but it was based on the same authority that granted and issued Schwintzer & Graff's German patent. Both parties occupy the same position in the eyes of the law. Hecht's right to do precisely what the patent granted to Schwintzer & Graff the privilege to do, *was reserved by the law*, when

22 the patent was granted, hence both parties stand with equal rights and privileges under the law.

If this is so the rule applied to licensees under a patent cannot apply here, because Hecht was not a licensee. We go further and say that as the United States patent was applied for *after* the patentees had accepted a *limited* patent in Germany, the United States patent should be likewise limited. The theory of our law is, not to grant to foreigners any greater patent privi-
23 leges than their own country grants them. We limit the life of a United States patent to the term of the shortest foreign patent issued before the application for the United States patent. See *Bate Refrigerating Co.*, vs. *Gillett, 13 Fed. Rep. 553, Gramme Electrical Co.*, vs. *Arnoux & Hoch Elect. Co., 17 Fed. Rep. 838.* The object of this limitation is to prevent any greater monopoly in the United States than ex-
24 ists in other countries.

And in construing an American patent where the inventor has taken out a foreign patent, the courts limit the construction of the American patent so that it shall agree with the construction of the foreign patent.

Ashcroft vs. *Railroad Co., 7 Otto 189.*

This is the first instance brought before the Courts, we believe, wherein this state of facts

existed. The nearest case is that of *Holiday* vs. *Matheson* heretofore referred to, and following the analogy of the law as laid down in that case, we are convinced that the same reason that formed the rule in that case is equally applicable to this. In fact, no other rule would be just to American merchants and tradesmen. If Germany fixes her patent law so as to grant a double right, the United States in self defense must recognize that double right by limiting her grant correspondingly, otherwise an innocent tradesman as in this case travelling through Germany, and finding a manufacturer making and selling an article under protection of German law, is liable to be misled and made a victim without fault of his own, and while he is transacting business in the usual and ordinary way.

JURISDICTION.

We insist that this case should be dismissed for want of jurisdiction, on the ground that the title to the patents, sufficient to maintain a suit for infringement, was not, at the date of filing the Bill, vested in the complainants.

When complainants commenced to take their testimony in this case counsel for complainants presented certain assignments *absolute in form*, by which, on their faces, the full title to the

patent sued on was vested in complainants. Relying upon the face of these assignments, counsel for respondents admitted "that the title "to all rights under the patent 'Exhibit A.' are "by mesne assignments in complainants as "alleged in the bill" (line 91–92, pg. 62 Transc.)

It subsequently transpired, however, in taking the testimony of complainant Graff that a contract existed between said complainant Graff and Carl Schwintzer, one of the patentees, and the alleged assignor of six twenty-fourths interest in said patent to said complainant, Graff. (See Ans. to Ques. 7 to 10, pg. 86 Transc.) Whereupon counsel for respondents *withdrew his admission* of title in complainants (see bottom of page 86 of Transc.) Complainants thereafter introduced in evidence the assignment from Carl Schwintzer and Wilhelm Graff to said Albert Graff, Complainant herein. (See Complainant's Exhibit F., pg. 118 Transcript.) This assignment is dated the 22d day of April, 1885, and the consideration therein expressed is "the sum "of one hundred dollars, and other valuable "considerations."

The contract between Schwintzer and Graff is found on pages 131–132 Transcript and is marked Respondent's Exhibit 5.

It contains four clauses. The first clause provides that "Mr. Albert Graff binds himself to

31 " pay to Mr. Carl Schwintzer, instead of the con-
" sideration in the letters patent mentioned, one
" hundred dollars for the first year, the sum of
" 250 marks payable on the first of February,
" 1886 and each following year on the same date
" the sum of 500 marks (not less) till the sum of
" 4,000 marks are paid in all.'"

The wording of this clause is peculiar, but its meaning is plain. It is evidently a translation from German into English.

32 Witness Graff testifies that the words "instead
" of the in the letters patent mentioned one hun-
" dred dollars for the first year," refers to the $100 referred to in the assignment (complainant's Exhibit F) see Graff's testimony from Ques. 30, page 95 to answer to Ques. 36, page 96 Transcript.

The meaning then of this clause is, that in lieu of the $100 consideration stated in the assignment, Graff should pay to Schwintzer 250
33 marks on the first day of February, 1886, and not less than 500 marks on the same date of each succeeding year, until the full sum of 4,000 marks were paid.

Graff testifies (Ques. 26–27, page 95 Transcript) that the contract was made at the same time the assignment was made, but in answer to Ques. 28, same page, he says ; "This contract
" was made one day later than the assignment

34 "was made." It does not appear when the assignment *was delivered.* Undoubtedly not until the contract was signed; viz: the next day after it was drawn, because the witness says the contract and assignment were made at the same time. It matters not however, whether they were made on the same day or not, they formed a single transaction.

In the case of *Dibble vs. Augus* reported in 7 Blatch. 90, there was an assignment and a con-
35 tract. In that case Judge Blatchford said: "The two papers of the 8th of May, 1868, must "be construed in connection with each other."

Now, considering the assignment in connection with this first clause of the contract, (and there is nothing in the contract inconsistent with the first clause) the two documents construed together amount to simply a *contract to assign when Graff shall have paid the sum of 4000*
3 *marks.*

But when we take into consideration Clause 3 of the contract, we find that Graff's title was in jeopardy of being terminated at any time. Clause 3 reads: "S. 3. Should not Mr. Albert "Graff, San Francisco, against all expectations "stick to the agreements mentioned in S. 1 and "2 all titles of the letters patent ceded to him "by Carl Schwintzer shall him return."

37 This means that in case Graff should fail to make any of the payments at the dates mentioned in Clause 1, or if he should fail to make a new agreement in case he did not sell 1000 burners, (provided for in Sec. 2, contract,) the entire contract was cancelled and annulled and the title should revert to Schwintzer.

The contract then was an executory contract. The payments were all future payments. No legal title could rest in Graff until he had per-
38 formed all the conditions of the contract on his part to be performed, because in case of failure to perform either of the conditions the title *per se* reverted back to Schwintzer.

At most Graff could only be regarded as a licensee of the interest under the patent until such time as his contract should be executed according to its terms.

"A contract for the purchase of any portion "of the patent right may be good between the
39 "parties as a license, and enforced as such in "the courts of justice; but the legal right in the "monopoly remains in the patentee and he "alone can maintain an action against a third "party who commits an infringement upon it."

Gayler vs. *Wilder*, 10 How. 477.
Sanford vs. *Messer*, 1 Holmes 149.
Blanchard vs. *Eldridge*, 1 Wall. Jr. 337.

40 The original Bill of Complaint in this case was filed on the 17th day of September, 1886.

Graff testifies (Ans. to Ques. 7, pg. 100, Transcrpt) that he made the first payment of 250 marks under that contract on the 2d day of January, 1886.

In answer to Ques. 9, same page, he says he don't know when he made the second payment.

A third payment of 1200 marks was made in January or February, 1887, (Ans. to Ques. 17,
41 pg. 101 Transcript), *after the commencement of this suit*, and a fourth payment of 2000 marks was made still later in May, 1887 (Ans. to Ques. 27, pg. 101 Transcript), within three months after the third payment.

It therefore appears that when this suit was commenced there was actually 3200 marks of the consideration unpaid and possibly 3750 marks. In fact, it appears from the testimony
42 that only 250 marks had been positively paid before the commencement of this suit. All the balance was due, and we hold that as long as Graff's title was based on a contingency it was only an equitable title, while Schwintzer owned the legal title. It is apparent that Complainant Graff and his counsel were cognizant of this defect in the title, because Graff completed the payment of the 4,000 marks before it was due, under the contract, and after it had appeared in

43 testimony that a contract existed, and its production was demanded in this case.

The testimony of Graff regarding the existence of the contract was given, and the demand for its production was made on the 23d day of April, 1887 (see Transcript, page 86), and it appears that Graff made a payment of 2000 marks in full of the 4000 marks on the 2d day of May, 1887, when under the contract the payment of 500 marks per year would not have completed
44 the payment of the consideration until the year 1894.

Now we think it is plain that when this suit was commenced Carl Schwintzer was the legal owner and holder of the 6-24 interest in the patent, and as such was a necessary party in this suit.

LAW ON THE POINT.

"All parties having title to the patent are
45 " necessarily parties, either as plaintiffs or as " defendants ; and those who dispute the title " should be made defendants."

Edgerton vs. *Breck*, 5 Barns & Ard, 42.

Jordan vs. *Dobson*, 2 Abb., 398.

"A patentee may maintain a suit at law upon " his patent in his own name, *although he is un-* " *der contract to assign it to others, if the contract* " *has not been executed.*"

Wheeler vs. *McCormick*, 11 Blatch, 334.

46 "In all cases where an assignment does not "pass the legal title and is not absolute and un- "conditional, or there are remaining rights or "liabilities of the assignor which may be "affected by the decree, *the assignor is a neces-* "*sary party to the suit.*"

Potter vs. *Wilson*, 2 Fish, 102.

"Where one person has the legal title to the "patent and another an equitable right therein "both must be made parties to the suit in ac- "tion in equity to restrain infringement."

47 *Gamewell Fire Alarm Telegraph Co.* vs. *City of Brooklyn*, 22 O. G. 1978.

THE PETITION FOR REHEARING.

Emile Boesch, the principal member of respondent's firm, was absent in Europe as before stated on account of his health, during the trial and decision of the cause, and only returned to San Francisco just before the matter of accounting was taken up by the Master. It appears from the affidavits of Emile Boesch and Martin Bauer, page 161 and Jno. L. Boone, page 165, that Martin Bauer, the partner and respondent who was left in charge of the San Francisco house of E. Boesch & Co., was entirely ignorant of any of the facts necessary to make a proper defense of the case. It further appears that Mr. Boesch had knowledge that mitraelleuse

48

burners with half cap like those purchased by him from said Hecht, had been on sale in the New York market for more than two years before Schwintzer & Graff's application for a patent in the United States, and said Boesch set immediately to work upon his arrival in San Francisco to procure such evidence; (see affidavit of Emile Boesch, page 161 Transcript.) that as soon as possible thereafter, said Boesch did obtain and receive the affidavits of Bennett B. Schneider, of South Orange, County of Essex, State of New Jersey, page 162–3. Jacob Kasschau and Christian Huebbinett, of New York City, State of New York, (pages 163–45, transcript), wherein it was made to appear that mitraelleuse lamp burners, with cap exactly like those sold by respondents, had been on sale in the New York market since the year 1879, four years before the date of Schwintzer and Graff's application for a patent in the United States. In order to identify the burner and remove any suspicion that the claim of more than two years use was not genuine, the said Jacob Kasschau attached to his affidavit, as an exhibit, a lamp burner, which he affirmed in said affidavit was one of the identical burners imported by his house into the United States from Germany, prior to July 1st, 1881, and sold in the United States. That in the month of December, 1887,

52 *and within two months* after the date of the Interlocutory Decree in this case the solicitor for Respondents presented the affidavits of said Conrad Petsch, pages 159–160, and of Bauer, Boone, Boesch, Schneider, Kasschau and Huebbinett, together with a petition for a rehearing of said cause, setting out such newly discovered matters of evidence as a ground for setting aside the judgment and decree, etc.

53 That notwithstanding such showing and the positive character of the proofs offered, and notwithstanding the proper presentation to the Courts of the cause of the delay in producing such evidence, and the great hardships to respondents, and no showing to the contrary being made, the Court refused to grant a rehearing of the cause or to permit such evidence to be used.

54 We therefore allege as error the refusal of the Court to grant a rehearing of the cause.

THE MASTER'S REPORT.

The Master after hearing the testimony produced before him on the accounting reports as follows:

"I therefore find and do report that the num-
"ber of lamp burners proven to have been sold
"by respondents, containing the invention
"claimed in and by the first claim of complain-

55 "ant's letters patent, is FOURTEEN, provided that "only the capped burners sold contain said in- "vention, and that the number is *one hundred* "*and fourteen* if the half-capped burners so sold "are to be held to contain said invention."

He then proceeds to find damages in favor of complainant in the sum of TWO THOUSAND NINE HUNDRED AND SEVENTY DOLLARS AND FIFTY CENTS.

56 No discrimination is made in case the number of infringing machines was 14 or 114, and it would seem that if the number had been 1 the damages would have been the same.

The gross injustice of this finding is apparent on its face, without resorting to argument to show the fact.

THE PROFITS OF RESPONDENTS.

57 Respondent Boesch testifies (Q. 46, pg. 26) that he sold four 20-wick burners and six 16-wick burners.

The 20-wick burners he testifies (Q. 58, pg. 27), cost him $1.65 each, and they sold them (Q. 59, pg. 27) at $3.50 each, a profit of $1.85 each. Respondent's profits, then, on the four 20-wick burners were $7.40. The 16-wick burners cost $1.00 each (Q 54, pg. 26), and respondents sold them for $2.50 each, making a

58 profit of $1.50 on each burner, or a total of $6.00 for the four burners.

The four 20-wick burners which they sold prior to that yielded a profit of $7.40, making a total profit of $20.80 on all the burners sold by the Respondents of the Miller burners which Kasschau's affidavit on page 163 Transcript, shows was on sale in the United States more than two years before Schwintzer & Graff's application for a patent was filed, are not re-
59 garded.

PROFITS AND DAMAGES

We submit that this is not a case in which the complainant can waive profits and demand damages. The profits of respondents were squarely proven, and the Court could award to complainants the actual and true profits which the respondents had made.

60 As we understand the decision of this Honorable Court as laid down in the case of *Root vs. Railway Co., 15 Otto, 189–217*, Complainant is not permitted in an equity case to waive profits and demand damages *only*. The Court held in that case that damages may be awarded in an equity case in addition to the profits, but that the damages can only be resorted to *to make up a deficiency in the profits which were apparently received by respondents but not proved*: That equity deals only

61 with profits, but in order to provide against injustice to complainant where it appears that the respondent was benefitted by the infringement to a greater extent than his proved profits would cover, the Court could, in that case, resort to damages, *simply to make up the deficiency.* This is a just rule but to allow complainants to waive profits and demand *damages only*, would be in fact converting a Court of equity into a Court of law where "vengeance" can be satisfied. This
62 we contend will not be allowed.

Respondents profits are proven to have been $20.80, and the Court awards damages to the amount of *two thousand nine hundred and seventy dollars and fifty cents, does not infact a Court of Equity by such a proceeding, convert itself into an instrument for the punishment of simple torts,* as was said by the learned Judge in *Livingston vs. Woodsworth, 15 How 546.*

63 The basis on which the Master proceeded was that respondents, by selling 14 of the burners for a few cents less than the complainants did, compelled the respondents to reduce the price of 10-wick burners 2 cents, 12-wick burners 50 cents and 16-wick burners 75 cents (see Master's report) *when, as a fact, it is not proven that respondents ever sold a single 10-wick or 12-wick burner.* All repondents sold were six 16-wick burners, and eight 20-wick burners

64 We submit that the proposition is absurd on its face that the sale of 14 (or 114) lamp burners of a different style and size, could, by any possibility, compel complainants to lower their prices, *on styles and sizes that respondents did not have and could not supply.* The testimony shows that respondents received their first shipment of burners about the 1st of January 1886. The date of the accounting is April 30th 188-, a little over two years, during which time respon-
65 ents sold 14 (or 114) burners, we care not which number is counted on.

The Master finds (see Master's report) that between March 1st 1886 and October 31st 18-7, complainants sold about 6,000 burners at the reduced rate.

But respondents testify that as soon as they received notice that they were charged with infringing upon the patent, they ceased selling
66 capped burners, and after that, either removed the caps entirely, or sold the Miller (New York) burner. The 14 (or 114) infringing burners were then evidently sold by respondents within a month at most, after they received their shipments.

This month's sale then, *according to the Master's decision,* compelled complainant to reduce the price of his burners, and *keep the price reduced up to the very day of the accounting.*

67 The testimony shows that the defendants did not sell any of the infringing burners after the commencement of the suit—a period of a year and a half. Defendants ceased selling when they were sued, *but defendant Graff was selling all the the time up to the date of the accounting.* It does not appear that Graff attempted to place the price of the burners back to the same price they were selling for, before the alleged infringment, but the Master graciously calculates
68 the reduction of price on all burners sold by Graff, up to the date of the accounting.

This suit was commenced in 1886. In August, 1887, respondent was selling the burners at the reduced price, although he had no competition, and there was nothing under the sun to prevent him from putting the price back to the original figures. Does this show that the competition caused by respondents selling 14 or
69 114 of the burners compelled him to reduce his prices? At this rate Graff might have gone on selling his burners at the reduced rate to the end of his patent, without commencing suit, and then by commencing suit, and showing the amount of the reduction on every burner he had sold to the end of the patent, demanding an accounting, and under the same doctrine, and on the same proof, the Master would have awarded it to him.

70 This is not equity. A respondent has no show under such circumstances and proceedings. He had far better submit himself to the most ravenous jury in the land. In fact before a jury he would at least have the opportunity of pleading for sympathy, but in this proceeding there was no sympathy—not even cold-blooded justice.

Why this should be, in the face of the proofs *that respondents ceased infringing the instant they*
71 *were informed that the burner was claimed to infringe upon the patent, and in view of the further proof that they refused to accept the dozen burners from McFadden and Hatton*, we cannot see. It is plain from the testimony that respondents did everything they could to avoid litigation, but it seems that a victim was wanted and these defendants served the purpose.

Again, we submit that the Master overstepped
72 the ordinary and well-known rule of Patent Law laid down in *Seymour* vs. *McCormick, 16 How.*, 480, that "Damages are not the same for "the infringement of an entire machine as for "that of an improvement on a machine."

The same rule is laid down in *Gould's Manufacturing Co.* vs. *Cowing, 12 Blatch*, 243, and is the usual rule in such cases.

In this case the master based the damages on the reduction of price on the *whole burner*, at

73 the same time admitting that the invention covered by the 1st claim of the patent is merely the cap surrounding the upper ends of the wick tubes. He says in his Report (pg. 21), "It is a "fact of common knowledge that there is to be "found on sale in the market a great variety of "lamp burners, among which, *as shown by the "evidence, have been for many years burners of the "same general class as complainants.*"

74 If respondents had sold those burners "of the same general class as complainant's" referred to by the Master, instead of the 14 (or 114) burners they did sell, we apprehend the damage to complainants would have been just the same.

The Master insists that the "chief feature of "the patented invention was the cap" in the face of the testimony. Boesch's testimony on page 37 that the lamp was better without the cap *if a proper draft appliance was used.*

75 That there was no demand for mitraelleuse burners with caps. (Ques. 24. page 32).

Nobody ever asked him for a mitraelleuse burner with cap. (Ques. 25, page 32).

Nobody ever asked him for a Schwintzer & Graff mitraelleuse burner. (Ques. 26, page 32).

There was no difference in the selling quality of the Boesch burner—without a cap—and the capped burners he bought from Hecht. (Ques. 27, page 32).

76 The Boesch burner is the best. (Ques. 28, page 32.)

It gives a whiter and better light than the Graff burner. (Ques. 29, page 32).

The cap is a nuisance (Ques. 11, page 34).

Boesch was a practical lamp man. His testimony was based on knowledge obtained by experience and experiments and are entitled to weight.

77 ASSIGNMENT OF ERRORS.

We therefore insist that the Court below erred in the following particulars.

1. In refusing to dismiss the case for want of jurisdiction.

2. The Court erred in deciding that the purchaser of an article from a manufacturer in a foreign country, who had been invested under the laws of said foreign country with the right to
78 manufacture, use and sell equal to that of a patentee of said article, in said foreign country, would infringe upon an American patent applied for and issued to said foreign patentee, after he had accepted a limited patent from said foreign Government.

3. In deciding that a narrow metal plate which only extended from the circumferential center of the tubes outward and left the spaces between the tubes open to access of air to

79 the flames was an infringement on their first claim of the letter patent sued on, wherein the cap is claimed specifically as preventing the access of air between the tubes.

4. In confirming the report of the Master.

5. In refusing to grant a rehearing on the showing made in and by respondent's petition for rehearing.

And for the purpose of establishing error in the ruling of the Court in confirming the re-
80 port of the Master, we insist that said Master erred in the following particulars.

1. The Master erred in permitting the complainant to waive profits and rely on damages only.

2. The Master erred in awarding damages after defendants' profits had been fully proved.

4. The Master erred in basing damages on the reduction of prices on the whole burner
81 where the invention is admitted to be simply the addition of a new feature, the cap, to an old machine (the mitraelleuse burner).

4. The Master erred in not taking into consideration the difference in damages between 14 burners and 114.

5. If damages were proper to be awarded at all, it was error to give damages covering a period of time longer than the time defendants was selling the infringing burners.

82 6. The Master erred in holding that the cap was the essential feature of complainant's lamp burner.

7. The Master erred in allowing damages on 10-wick burners and 12-wick burners when the testimony shows that defendants never had any burners of that style on hand.

8. The Master erred in holding that the infringement was wanton and without excuse.

83 J. J. SCRIVNER,

Solicitor for Appellants.

Office Supreme Court, U. S.
JAN 9 1890
JAMES H. MCKENNEY
CLERK

Supreme Court of United States.

OCTOBER TERM, 1889.

No. 1408.

EMILE BOESCH AND MARTIN BAUER,

APPELLANTS.

vs.

ALBERT GRAFF AND J. F. DONNELL.

APPELLEES.

Appellants' Reply to the Argument of Appellees.

J. J. SCRIVNER,

SOLICITOR FOR APPELLANTS

IN THE SUPREME COURT

OF THE

UNITED STATES.

October Term 1889.

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EMILE BOESCH and MARTIN BAUER.
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Reply Argument of Appellants.

Although counsel for respondents charge that "the statement of facts set forth in appel-"lants' brief *is full of misstatements*," they have failed to point out any *material* misstatement, or one that affects the record.

The first matter which they allege is a misstatement is found on page 6 of their brief, and it denies our statement that "upon receiving "this notification respondents consulted their "attorney and were advised to remove the caps

"and sell the remainder in that condition, "*which they did.*"

Counsel say: "This statement is not the fact. "Appellants did not remove the caps, nor sell "them in that condition. * * * * "Instead of following that advice they removed "only a small part of the cap, and this, even, "was not until after the suit was brought."

The testimony shows that Boesch was in Europe when he bought and shipped the burners to San Francisco. That his first shipment was received in January, 1886. The original bill in this case was filed Sept. 17th, 1886, eight months after the shipment was received in San Francisco. Now does counsel mean to say that during that eight months the house of E. Boesch & Co., *the largest Lamp House on the Pacific Coast*, only sold fourteen lamp burners, while Graff, who had a small 8x10 business, was selling theirs by the thousands? (See Master's Report.)

Counsel insist that appellants kept selling unaltered burners until after the suit was brought, and yet all they could prove appellants did sell of that kind was fourteen (see Master's Rep.).

But what does the testimony say?

Cross Q. 31, pg. 25, Boesch's Testimony. "Now going back to the first invoice, what did "you do with the fifty 20-wick burners that had "caps on?"

A. "*At the time that I received notice that they* "*were infringements I altered them. Previous to* "*that time I had sold four of them.*"

As to the second invoice, the testimony is that most of them are still on hand (See Ans. to Q. 44, pg. 26 Transcript).

Where, then, is the misstatement in this respect?

But, say Counsel: "appellants simply cut "away a portion of each cap, converting the "burners into what is styled the half-capped "burners, which are as much an infringement "of the patent as the full caps."

The criticised statement in our brief was made in relation to appellants' *good faith* in trying to avoid litigation. Their counsel advised them that the half caps were no infringement on the first claim of the patent, because one element of that first claim was *a cap which closed the intermediate spaces between the tubes to prevent direct access of air to each wick.* (See specification of Complainant's patent, page 139 Transcript, top of page 139, also see 1st claim of patent.)

By removing half the cap, air is admitted directly to each wick; consequently in Counsel's opinion the half cap was not an infringement. Appellants, therefore, were simply following their Counsel's advice, and their act

must be construed as an act of good faith in endeavoring to avoid litigation.

But Respondent's Counsel themselves contended in their argument on the Petition for Re-hearing before the Court below, when they were called upon to face the affidavit of Jacob Kasschau (page 163 Transcript), *with its attached exhibit*, in which it was *shown that the half-capped burner had been on sale in the United States more than two years prior to Schwintzer & Graff's application for a patent, that a half-capped burner would not anticipate the patent.* If it would not anticipate, it certainly would not infringe.

Stainthorpe vs. *Elkington*, 1 Fish, 349.

We cannot be charged, therefore, with having made a misstatement in this respect.

On page 7, Appellee's brief, we are charged with having made an ther misstatement. We are charged with having said that after the Appellant had sold ten of the full caps "they re- " moved the caps altogether *from the remainder.*" Our brief makes no such statement. The portion of our brief referred to is the last line on Page 3 of our brief, where we say, "after which " respondents removed the caps *of all they sold.*" The testimony shows, as we have just above stated and quoted, that most of the burners of the second shipment are yet in Respondents' possession. The fact is, that *as fast as they sold them* they altered them. This is, therefore,

rather a misstatement on the part of Appellees.

Again Appellees deny our statement that Respondents "*sold none with full caps,*" and refer to the Master's Report to prove their assertion. We prefer to refer to the testimony.

Q. 18, Page 32, Transcript. "Now you sold "none of those with the full cap, such as was "manufactured by Schwintzer & Graff?"

A. "No, sir."

Q. 19. "But you have sold four of the Hecht "burners, with the corragations on the inside?"

A. "Yes, sir. I have sold the number "already stated."

Q. 20. "Then you have sold a number of "those called the Miller burner?"

A. "Yes, sir."

Q. 21. "Then, also, you say you have sold "some of the 'Boesch improved' burners?"

A. "Yes, sir."

We are therefore again correct.

We did, inadvertently, make one misstatement in our brief, and that is the one referred to on Page 19 of Appellee's brief. The first invoice of burners shipped by Appellants from Germany was purchased from one Carlo Holy of Berlin, *but they were Hecht burners.* Instead of purchasing them from Hecht, they bought them from Carlo Holy, and Counsel are right in calling our attention to it.

Counsel object to our Assignment of Errors, for the reason, as they say, that the errors assigned were not raised in the record. Every error assigned was raised in some form or other and overruled during the pendency and progress of the suit in the Court below, except possibly, the first exception on the question of jurisdiction. In that respect the ground for objecting to the jurisdiction arose so late in the trial of the case, being developed during the taking of the testimony, that Counsel did not take any formal proceedings to demand a dismissal on that ground; but as we understand the rule, question of jurisdiction can be raised at any time during the progress of a suit, *and ought to be raised and acted on by the Court itself.*

Florence Co., vs. *Singer Co.* 8 Blatch., 113.

On page 34, of Appellee's brief, we find the following statement:

"Of course we recognize the rule of law that "in calculating an infringer's profits, where the "patent covers only an improvement on an old "machine, the profits recoverable are those due "to the improvement alone, and not to the "profits realized from the whole machine. In "such case it is Complainant's duty to segre-"gate the profits, that is, to show what propor-"tion is due to the patented parts, and what to "the unpatented parts."

This we have done. On page 32, from Ques. 19 to Ques. 30, we have shown that there was no difference between the selling price of the burner with a cap and those without a cap.

On page 34, from Ques. 10 to Ques. 20, we have shown that the cap is a nuisance, and no use was found for it in the sale of burners.

On page 35, Ques. 26, down to Ques. 34, we show that the burner is better without a cap.

All this testimony is undisputed, except by general assertions made by Graff himself. As we showed in our former brief, the same rule applies as to damages. Suppose that instead of being a lamp burner, the invention was a small improvement on a steam-engine, or threshing-machine, could the Complainant, by waiving profits, recover damages on the whole machine when his improvement related only to a minor feature in the machine? We apprehend not.

We say there is no law or equity that will give a patentee damages on a whole machine unless his improvement is the essential element and very soul of the machine. Where the machine could not exist, or could not be made to do the work without the improvement, the improvement practically becomes the machine itself. Such, for instance, was the patented lock referred to in *Yale Lock Mfg. Co.*, vs. *Sergeant*, referred to by Counsel, wherein the patented feature was the turning bolt. Take away the

turning bolt, *and you had no lock*. The turning bolt was the soul of the lock. The same may be said of all the other cases referred to by Counsel. Not so in the present case. Mitrailleuse burners had been in use for years prior to Schwintzer & Graff's invention *without a cap*. At most, the cap is only a convenience. The burner was practically just as good without as with it, and the testimony shows that it was better.

Consequently, measuring this case by Counsel's own doctrine, the finding of the Master and the Court was wrong.

There is no necessity to discuss this matter further. The judgment appealed from, is so flagrant, so apparently preposterous and outrageous, that we confidently submit the questions involved, knowing that the rights of citizens are respected and protected by the Court of last resort.

Respectfully submitted,

J. J. SCRIVNER,

Solicitor for Appellants.

Supreme Court of United States.

OCTOBER TERM, 1889.

No. 1408.

EMILE BOESCH AND MARTIN BAUER,
APPELLANTS,

vs.

ALBERT GRAFF AND J. F. DONNELL,
APPELLEES.

Argument for Appellees,

(ON SUBMISSION UNDER RULE 20.)

JNO. H. MILLER,
J. P. LANGHORNE,
FOR APPELLEES.

IN THE SUPREME COURT

OF THE

UNITED STATES.

October Term, 1889.

No. 1408.

EMILE BOESCH and
MARTIN BAUER,
Appellants,

vs.

ALBERT GRAFF and
J. F. DONNELL,
Appellees.

Argument of Appellees on Submission of Case under Rule 20.

Statement of Facts.

The statement of facts set forth in appellants, brief is full of mis-statements, and hence we are forced to give what we claim to be a correct statement of the facts.

This is a suit in equity, brought by Albert Graff and J. F. Donnell, appellees, against Emile Boesch and Martin Bauer, appellants, to recover in the usual form for infringement of Letters Pa-

tent No. 289,571 for a lamp-burner, granted on December 4, 1883, to Carl Schwintzer and Wilhelm Graff, of Berlin, assignors of one-half to J. F. Donnell & Co., of New York. By mesne assignments all rights under the patent are vested in the appellees.

Trial was had on the merits in the court below, and an interlocutory decree made, decreeing an infringement of the first claim and referring the case to the Master for an accounting. (Record 15.*)

The opinion of his Honor, Judge Lorenzo Sawyer, rendered in deciding the case, is reported in 33 FED. REP. 279. A copy thereof is annexed hereto and marked APPENDIX A.

After the decree was rendered a petition for a rehearing, on various grounds, was made (Record, 159) and after elaborate arguments, was denied by the Court (Record, 166).

The case then went to the Master, who reported that the infringement was *wilful, wanton, and persistent;* that the appellees sustained damages thereby to the extent of $2970, and that they waived all claims to the profits realized by the infringers. A copy of said report is hereto annexed, and marked APPENDIX B.

Appellants filed exceptions to this report (Record, 55), which, after argument, were overruled (Record, 56), and on Februrary 13, 1889, a final

*References to the Record are to the pages, not to the folios.

decree was entered in favor of appellees for $2970 and costs (Record, 58).

From this decree appellants have prosecuted an appeal to this Court, and by stipulation of counsel the case has been submitted on printed arguments under Rule 20.

The patented invention was made by Carl Schwintzer and Wilhelm Graff, of Berlin, and was first patented in Germany. J. F. Donnell, of New York, doing business under the name J. F. Donnell & Co., purchased a half interest in the U. S. patent prior to issuance, and the same was issued to Carl Schwintzer and Wilhelm Graff, assignors of one-half to J. F. Donnell & Co. Appellee Albert Graff, who is a brother of Wilhelm Graff, acquired the other half interest by purchase, and the U. S. patent is owned jointly by appellees Albert Graff and J. F. Donnell.

The patent sued on contains three claims, but only the first one was infringed in this case. That claim reads as follows:

"In a lamp-burner of the class described, the combination with the guide-tubes of a ring-shaped cap provided with openings for the wicks, said cap being applied to the upper ends of the guide-tubes so as to close the intermediate spaces between the same, substantially as set forth."

It appears from the evidence that appellee Graff is a small lamp-dealer at San Francisco, and formerly worked as a day laborer for the appel-

lants, who are large manufacturers of lamps and dealers therein at San Francisco, having the most extensive establishment of that kind on the Pacific coast.

In January, 1886, appellants imported from Germany and placed on sale in San Francisco an invoice of lamp-burners, comprising 50 with *full caps* and 100 with *half caps*. After selling 4 of the full-capped burners they were notified of the infringement, and thereupon they altered the remainder of the 50 full-capped burners into the half-capped style and continued their sales. (See Master's Report.)

It is stated by appellants in their brief, at page 3, that "upon receiving this notification respondents consulted their attorney, and were advised to *remove the caps and sell the remainder in that condition, which they did.*"

This statement is not the fact: appellants did not remove the caps, nor sell them in that condition. They simply cut away a small portion of each cap, converting the burners into what is styled the *half-capped* burners, which are as much an infringement of the patent as the full caps. In other words, the appellants resorted to a subterfuge. Their attorney advised them to *remove the cap*. Instead of following that advice, they removed only a small part of the cap; and this, even, was not until after the suit was brought. (Test. of Boesch, ans. to q. 34, Record, 35). This

was one of the reasons why the Master found that the infringement was *wilful and persistent.*

About a year after receiving the first invoice, the appellants ordered and received a second invoice of 200 burners, *all having the full caps.* Of these they sold 10 with the full caps, and altered the remainder by changing some of them to half caps, as previously, and by removing the caps entirely from the others.

This last alteration, however, was not made until after the interlocutory decree was entered, enjoining the appellants from infringement. Boesch testified that he made the alterations after he returned from Europe, (Record, 26–36), and he returned from Europe about October, 1887, (Record, 33). The interlocutory decree was made October, 1877, (Record, 19.)

Here again appellants make a mis-statement at page 3 of their brief. They say that after selling 10 of the full caps they removed the caps altogether from the remainder. The fact is, they removed the caps altogether from only *a portion of the burners*, and not until after the interlocutory decree.

Again, at page 4 of their brief, they say: "Respondents therefore sold fourteen of these mitrailleuse burners with half caps, but they sold none with full caps."

This is in direct conflict with the record. They sold fourteen with *full-caps* and 100 with *half-*

caps, and had the remainder in stock. (See Master's Report.)

The above facts formed the basis, in part, of the Master's finding of *wilful and wanton infringement.* We fail to see any advantage appellants can hope to obtain by making statements in their brief which are disproved by a mere reference to the Record.

Argument.

In their brief (page 26) appellants have specified several particulars, wherein it is claimed that the decree appealed from is erroneous.

These we shall now consider *seriatim.*

I.

As to the alleged Want of Jurisdiction.

It is claimed in this behalf, that at the time of the filing of the bill, appellees did not own the entire interest in the patent, but that one Carl Schwintzer (the assignor of appellees) owned an undivided *six twenty-fourths* thereof, and ought to have been made a party to the suit. From which it is insisted that the suit must be dismissed for want of jurisdiction.

There is no merit in the contention. It is not true that at the time of the filing of the bill any other person than the appellees owned any interest in the patent. On the contrary, the entire interest was vested in and owned by appellees.

The facts are these: On September 18, 1884, by a written assignment, appellee Graff acquired an undivided one-sixth interest in the patent. (Record 140.) On April 22d, 1885, by two other written assignments he acquired eight twenty-fourths, thus giving him an undivided one-half of the entire patent. Appellee Donnell already owned one-half; and thus the entire interest was owned by appellees. All of the assignments were absolute in form, expressed a money consideration, and were duly recorded in the Patent Office.

It is claimed, however, that there was a defeasance connected with the last assignment. The consideration therein expressed was $100, but this was not the true consideration, and *on the day after the assignment was made* another document was executed by the parties, to show what the true consideration was. The following is a copy of the same:

S. 1.

"Mr. Albert Graff binds himself to pay to Mr. Carl Schwint-
"zer, instead of the in the patent letter mentioned one
"hundred dollars, for the first year the sum of two hundred and
"fifty marks, payable on the 1st February, 1886, and each fol-
"lowing year on the same date, the sum of five hundred marks,
"(not less) till the amount of four thousand marks are paid in
"full.

S. 2.

"Should Mr. Albert Graff, of San Francisco, not be able to
"sell more than one thousand burners called Diamond or Mit-
"railleuse burners, No. 10,621, manufactured by Mess. Schwint-

"zer & Graff of Berlin, he reserves to himself to make up a new "agreement with Mr. Carl Schwintzer.

S. 3.

"Should not Mr. Albert Graff, San Francisco, against all ex- "pectations, stick to the agreements mentioned in S. 1 and "2, all titles of the patent letter ceded to him by Carl Schwint- "zer shall him return.

S. 4.

"Mr. Carl Schwintzer, partner of the firm Schwintzer & "Graff, engages to delive: to Mr. Albert Graff the said burners "at the same price as before, if the market price of the metal "does not exceed—make 150 per cent kos., and promise like- "wise to effect any order promptly, if in his power.

(Signed) CARL SCHWINTZER.

ALBERT GRAFF."

The language of this agreement is somewhat ambiguous, owing doubtless to the fact that the parties were not well versed in English, and the further fact that it was but a pencil memorandum taken down by Graff in a hurry (Record, 95). However, we think the intention of the parties can be figured out. It is this: Instead of paying the $100 mentioned in the assignment, Appellee Graff was to pay 4,000 marks, of which 250 were payable on February 1, 1886, and the balance in installments of not less than 500 marks on the 1st of February of each succeeding year, until the whole amount was paid; and if Graff failed to carry out his covenants, then the title was *to return* to Schwintzer. The object of this transaction was to enable Graff to pay the 4,000 marks out of

sales of the burners, and also to afford Schwintzer some security for the payment.

It is claimed by appellants that it amounted simply to "a contract to assign when Graff shall have paid the sum of 4000 marks": that no title passed until all the payments were made, and that Graff was only a licensee until such payment.

This contention is without merit.

The assignments, being absolute in form, conveyed the legal title. *On the next day* (Record, 95, ans. to q. 28) the document was signed, relating simply *to the consideration*, providing for a different amount, its mode of payment, and that if not paid when due the title was to return to the assignor; or, as quaintly expressed by the parties, "all titles of the patent letter ceded to him by Carl Schwintzer shall him return."

This contract did not alter the status of the legal title, which had, *on the previous* day, been conveyed to Graff. It merely fixed a contingency, on the happening of which Graff was to reconvey the title to Schwintzer. In other words, it is the ordinary case of conveyance on *condition subsequent*, not on *condition precedent*. The distinction between such cases is well settled. A condition precedent is one which must take place before an estate can vest, and in such case no title passes until the condition is performed: as, for instance, if an estate be conveyed to A upon his marriage with B. In such event no title vests in A until

the marriage. But conditions subsequent operate upon estates already vested, and render them liable to be defeated *in futuro* on failure of the condition. The estate passes to and vests in the grantee, and so long as the condition remains unbroken they remain in the same situation as if no qualification or condition had been annexed.

4 *Kent's Com.* 125 *et seq.*

Here the assignment to Graff, being on condition subsequent, the title vested in him at the time of the execution of the assignment, and he was clothed with all necessary title for maintaining suits on the patent. Otherwise, he would have been without remedy against infringers. Counsel has made the mistake of construing the assignment as one on *condition precedent*, instead of *condition subsequent.*

But further: Graff has paid the full 4000 marks, the contract price, and hence his title is absolute. It matters not that the last payment was not made until after the suit was commenced. The payment, when made, related back to the time of the assignment. Where a conveyance is made on condition subsequent, and the condition is duly performed, the performance of the condition relates back to the date of the conveyance, and in law it is the same as though no condition had been attached.

But it is not necessary to speculate on this

question, for it has been directly adjudicated by this court in

Littlefield v. Perry (21 Wall. 205).

But in addition to the foregoing there is an admission by appellants in the record that the whole title is in the appellees.

At page 62 of the Record we find this: "Respondents admit that the title to all rights under the patent Exhibit A is vested by mesne assignments in complaints, as admitted in the bill."

Counsel for appellants afterwards (Record, 86) endeavored to retract the admission; but after an admission is once made by a party during the progress of a trial, and his adversary relies thereon, he cannot withdraw such admission, unless specially authorized to do so by the Court. Here counsel did not apply to the Court for such permission, nor is there any order of the Court allowing him to withdraw the admission. If he desired to withdraw it, he should have applied to the Court and obtained permission to do so. As it stands, he must abide by the admission.

II.

As to the purchase by Appellants of the burners in Germany.

It is claimed by appellants that they bought all the infringing burners which they sold from one

W. H. Hecht, in Germany, who had a right to make and sell them there, and that this confers on appellants the right to sell said burners in the United States.

Counsel states the question thus: "Can an innocent person who purchases from Hecht in Germany, in the ordinary course of trade, and who imports the burners into the United States, be prevented by a United States patent from selling them" (in the United States)?

We shall not stop to question whether appellants were *innocent purchasers*, as that is immaterial, although it appears from the evidence that they were not innocent purchasers; but, on the contrary, they imported a second invoice a year after they were notified of the infringement, and after this suit was commenced. The Master so finds, and it is a fact.

But waiving that question, let us examine the matter.

It appears from the evidence that the subject-matter of our first claim was patented in Germany prior to the date of the American patent. Now by a certain provision of the Imperial patent law of Germany, a German patent "has no effect" against a person in that country, who, at the time of the application by the patentee for his patent, "had already been using the invention in Germany, or who had made the necessary preparaitons for using the same." A copy of this law

will be found in 12 *Off. Gazette*, 183 and 267 (May 25, 1877), and also in *Scientific American Supplement, of July* 14, 1877, at page 1265.

This man Hecht had made preparations to manufacture the burners prior to the application for the German patent. Hence, under the law above quoted, he had a right to practice the invention in Germany after the grant of the patent. In other words, the German patent "had no effect against him." Such was the adjudication of the German Court, as appears by the judgment roll in the case of *Schwintzer & Graff* vs. *Hecht*, offered in evidence by appellants, and marked "Respondents' Exhibit 2. (Record, 152–155.)

On these facts it is claimed that a dealer *residing in the United States* can purchase the patented burners from Hecht *in Germany*, and import them to and sell them *in the United States*, without the license or consent of the owners of the United States patent.

The contention is sought to be maintained on an assumed analogy to those cases where the holder of a United States patent has sold territorial rights to different persons in the United States. The cases on that point, however, decide only that the unrestricted sale of a patented article by a territorial grantee, confers on the purchaser the right *to use*, not to *re-sell*, that particular article in any other territory of the United States.

The first of these cases chronologically is *Adams* vs. *Burke* (1 Holmes, 40, and 4 Fish, 392), decided by Judge Shepley. The only question involved was the right of a purchaser in one territory *to use* the article outside of that territory. It is true the language of the decision might be considered broad enough to include the right *to sell*, as well as the right *to use*; but as only the latter right was involved in the case, whatever was said as to the former is *dictum*.

The next case was *McKay* vs. *Wooster* (2 Sawy. 373), decided by Judge Sawyer. It was based on Judge Shepley's decision, and decides nothing different therefrom.

Adams vs. *Burke* then reached the Supreme Court in 1873, and in the opinion there rendered (17 Wall. 453) a clean-cut distinction was made between the right *to sell* and the right *to use*, and was stated in this form: "Where a patented article, whose sole value is in its use, is lawfully sold within a district to which its vender is limited, it may be *used* anywhere." Not a word was said about the right of the purchaser to *re-sell*, and hence the dictum of Judge Shepley is of no effect. Even with the above limitation there were dissenting opinions by Justices Bradley, Swayne, and Strong, who held that the purchaser could not even *use* the article outside of the district where it was sold.

This Court has never passed squarely on the

right of such purchaser to *re-sell* the article outside of the district where it was purchased, and we respectfully ask that the question be passed on here and settled once for all. It is a question which is constantly arising in patent cases, and there ought to be a ruling on it by this Court for the guidance of the profession.

It has been passed on several times of late by different Circuit Courts, notably by Judge McKennan in *Hatch* vs. *Adams*, 22 Fed. 438, and by Judge Wheeler in *Hatch* vs. *Hall*, 22 Fed 438, and *Hatch* vs. *Hall*, 30 Fed. 613. These cases hold broadly that a purchaser of patented articles from a territorial grantee of the patent does not acquire the right to re-sell those articles outside of the territory of his vendor.

Hitherto we have discussed the question at issue on the assumed theory that the purchase of the burners in Germany would, by analogy, be on the same footing as their purchase from a territorial grantee of the U. S. patent in the United States; but as matter of law there is no such analogy.

Hecht, the vendor of appellants, had a right to make and sell the burners *in Germany*. That right was conferred on him by the German laws. How a German law, regulating the sale of articles in Germany under a German patent, can have any effect on the sale of articles in the United States under a United States patent, we are at a

loss to conjecture. The only possible way in which a prior foreign patent can affect a United States patent is to limit its life to that of the foreign patent, but that is expressly provided for by our patent law. If counsel's contention is correct, then in cases like the one at bar our patents would be subordinate to and controlled by foreign patents *by virtue of foreign laws.*

The only case cited by counsel to sustain him in his remarkable contention, is that of *Holiday* vs. *Matheson*, (24 Fed. Rep. 185). The case is clearly not in point, nor was the same question involved. There the American patentee had sold the patented articles to purchasers in England without restriction, and those purchasers had resold the articles to other persons in the United States. These latter purchasers were held not to be infringers. This was right. They acquired the articles indirectly from the patentee himself in the United States, that is to say *from the owner of the territory where they were seeking to sell the articles.* The patentee had gotten one royalty by his original sale, and it is well settled that a patentee can get but one royalty on any one particular article. Thereafter such article is forever freed from the monopoly of the patent.

We are willing to rest this point of our case on the opinion rendered by his Honor, Judge Sawyer. It is clear and logical, and in our judgment not susceptible of refutation.

But irrespective of the above views, this decree is correct, even if appellants had a right to sell the Hecht burners. They assert that all the burners they sold were purchased from W. H. Hecht in Berlin, who had a right to sell them. This is not true. It will be remembered that appellants received two invoices from Germany. One of these, (the second one) was from Hecht, but the other one (the first) was not from Hecht. Those burners were purchased from one Carlo Holy, of Berlin, a man who had no right to sell them, as Hecht had. Mr. Boesch himself testified that they were purchased from Holy.

See Record, p. 49, *ques.* 21.

III.

As to the question of Infringement.

It is contended that the *half-caps* are no infringement. In the words of counsel, the Court erred:

"In deciding that a narrow metal plate, which only extended from the circumferential center of the tubes outward, and left the spaces between the tubes open to access of air to the flames, was an infringement on their first claim of the letters patent sued on, wherein the cap is claimed specifically as preventing the access of air between the tubes." (Brief, p. 26.)

Counsel could not have had much confidence in this contention, for it is not argued in the brief at all. It is placed in the specifications of errors at the close of the brief, but is not mention in the body of the brief.

But the *half-capped* burners are plainly an infringement of the patent. They are an inferior form, but they, nevertheless, embody the invention. The difference between the two is but one of degree.

The objects of the cap are: 1, To form a strengthening band or ring around the tubes so as to hold them rigid and straight; 2, To protect the tops of the tubes from burning and deterioration; 3, To form a smooth, even surface, so that the wicks can be easily trimmed by simply running a ragor brush across said surface; and 4, To close the intermediate spaces between the wick-tubes, so as to regulate the flow of air to the flame.

The *half-caps* were produced by simply taking the *full-caps* and chipping off a small portion of the inner rim, thereby only *partially* closing the spaces between the wick-tubes, instead of *entirely* closing them. This was a mere evasion. The cap still performed all its usual functions. It still acted as a strengthening band; it still protected the tops of the tubes; it still formed a smooth surface for easy trimming, and it partially closed the spaces between the tubes. The entire effect of the change was to allow a little more air to reach

the flame. It did not, however, allow too much air, as would have been the case if the entire cap had been removed. As long, therefore, as a substantial part of the cap remained, the integrity of the invention was preserved; and this is shown by the fact that the half-caps were sold successfully both in this country and in Germany.

The difference was a difference *in degree*, not in *kind*--a difference in *form*, not in *substance*. That such a difference cannot avoid a charge of infringement, any more than it can constitute invention, is well settled by the decisions of this Court.

Winans vs. Denmead, 15 How. 330.
Morey vs. Lockwood, 8 Wall. 230.
Ries vs. Gould, 15 Wall. 187.
Eddy vs. Dennis, 95 U. S. 560.
Paper Bag Machine Co. vs. Murphy, 97 U. S. 120.
Heald vs. Rice, 104 U. S. 734.
Brush vs. Condit, 10 Sup. Rep. 1.

Such was the view taken by the German Court in the suit brought on the German patent against Hecht.

See Record, p. 153.

And even the appellants themselves were of the same opinion in the lower Court, for on petition for rehearing they produced a *half-capped* burner,

which they claimed was made and used long prior to the patent in suit, and was an anticipation of the patent.

Hence they must have been of the opinion that the *half-caps* were identical with the *full-caps*. We desire to remind the Court that the decree of infringement was not based on the sales of half-caps alone, but of full-caps and three-quarter caps. Appellants had sold full-caps, three-quarter caps, and also half-caps, as was shown by the testimony of Graff, Steele and Bauer. The question of half-caps did not come up until the accounting. Hence, in any event, the decree of infringement is correct.

IV.

As to the Rehearing.

It is insisted that the Court erred in refusing to grant a rehearing; but it is well settled that the granting and refusing of rehearings are matters entirely in the discretion of the trial Court, and such rulings will not be disturbed by the appellate tribunal, nor even reviewed on appeal.

Buffington vs. Harvey, 95 U. S. 99.
Hall vs. Weare, 92 Id. 728.
Mandeville vs. Wilson, 5 Cr. 15.
Welch vs. Mandeville, 7 Id. 152.
U. S. vs. Evans, 5 Id. 280.
Breedlove vs. Nicolet, 7 Pet. 413.

V.

The Master's Report.

The last assignment of error is that the Court erred in confirming the Master's Report: that said Report is erroneous and ought to be set aside.

It must be remembered that a Master's Report is entitled to the greatest respect. It is of the same solemnity as the verdict of a jury, and will not be interfered with, except for a *plain and palpable* abuse of power or discretion. Says Judge Coxe, in *Welling* vs. *LeBan*, 34 Fed. Rep. 41: "A Master's Report is not to be lightly brushed aside. It is entitled to respect. The proceedings before him have almost the same solemnity as a trial before a referee or a jury, and the familiar rule which precludes a Court from setting aside a verdict which is against the weight of evidence is to a great extent applicable."

The same rule obtains in this Court, for said Mr. Justice Gray, in *Tilghman* vs. *Proctor*, 125 U. S. 136: "The conclusions of the Master, depending upon the weighing of conflicting testimony, have every reasonable presumption in their favor, and are not to be set aside or modified unless there clearly appears to have been error or mistake on his part."

And Mr. Justice Blatchford approved and adopted that language in the subsequent case of *Callaghan* vs. *Meyers*, 128 U. S. 617.

See also to the same effect,

Metsker vs. Bonebrake, 108 U. S. 66.
Bates vs. St. Johnsbury, 32 Fed. Rep. 628.
Welling vs. LeBau 32 Id. 293.
Wooster vs. Thornton, 26 Id. 274.
Bridges vs. Sheldon, 7 Id. 17.
Greene vs. Bishop, 1 Cliff. 186.
Donnell vs. Insurance Co., 2 Sum. 66.
Mason vs. Crosby, 3 *W. & M.* 268.

It follows from the foregoing that the method of attacking a Master's Report should be governed by the strictest rules, and such is the law. By the rules of equity practice a party who is dissatisfied with a Master's Report is given ample time in which to object to the same, and in so doing he must file written exceptions (Eq. Rule 83), specifying particularly and in detail the grounds of exception. No objections will be considered or allowed which are not embodied in these written exceptions, and the exceptions themselves must be precise and specific. They are in the nature of a special demurrer, and a general exception will not be allowed.

Says Judge Drummond, in *Turrill* vs. *Illinois Central R. R. Co.*, 5 Biss. 345: "Exceptions must "show specifically wherein the error consists, and "specify the evidence relied on to show error."

And so likewise Mr. Justice Wayne, in *Story* vs. *Livingston*, (13 Pet. 359):

"Exceptions to a Master's Report must state, article by article, the parts of the report which are intended to be excepted to. * * *

"Exceptions are in the nature of a special demurrer, and the party objecting must point out the errors; otherwise, the parts not excepted to must be taken as admitted."

And Judge Woods, in *Stanton* vs. *A. & C. R. R. Co.* (2 Woods, 507):

"Exceptions to a Master's Report should be precise and raise well defined issues. When they are vague and general, and require of the Court performance of duties which properly belong to the Master and counsel, they will be overruled."

And Judge Clifford, in *Greene* vs. *Bishop*, 1 Cliff. 191:

"Exceptions to a Master's Report are written enumerations of errors alleged by the complaining party, and of the corrections he requests to have made; and they should be so framed as not merely to allege error in general terms, but should be sufficiently definite and explicit to enable the Court understandingly to decide on each point in dispute. Such appears to be the just and convenient rule to be deduced from the best considered modern cases on the subject, and it is one of great importance in this class of legal investigation, and ought in general *to be strictly enforced*. Were it otherwise, the reference to a Master would be of little or no avail, as it would involve the necessity for the Court to look into the whole testimony laid before him, and to decide the controversy as upon final hearing without reference to an appeal. General allegations of error, without pointing to any particulars, are clearly insufficient, for the reason that, if allowable, the losing party might always compel the Court to hear the cause anew."

The same rule is enunciated in the following cases:

Dexter vs. Arnold, 2 Sumn. 125.
Mason vs. Crosby, 3 W. & M. 258.
Harding vs. Handy, 11 Wheat. 126.
Wilkes vs. Rogers, 6 John. 592.
Da Costa vs. Da Costa, 3 P. Wms. 140.
Dubourg vs. United States, 7 Pet. 625.

Again; exceptions to a Master's Report cannot be made for the first time in this Court. They must be made in the first instance in the lower Court, and if they are overruled, the action of the lower Court in that regard may be reviewed here, that is to say, the action of the lower Court in overruling *those particular exceptions.* But new exceptions cannot be made for the first time in this Court, for it is the action of the lower Court in ruling on exceptions made there which this Court is called on to review. To allow new exceptions to be made in the appellate Court would be an act of injustice to the *nisi prius* Court; and it may be safely concluded that this Court will not listen to exceptions which were not made below, but are made for the first time in this Court.

Wilson vs. McNamee, 102 U. S. 574.
Kinsman vs. Parkhurst, 8 How. 289.
Springer vs. U. S., 102 U. S. 586.
Beck vs. Meagher, 104 Id. 279.
Clark vs. Fredericks, 105 Id. 4.
Railway Co. vs. Heck, 102 Id. 120.
Canal St. Rl. vs. Hart, 114 U. S. 654.

Bell vs. Bruen, 1 How. 169.
Doe vs. Watson, 8 Id. 263.
Barrow vs. Reab, 9 Id. 360.
Hudgins vs. Kemp, 20 Id. 54.

Having premised this much, we shall now examine the exceptions taken by appellants to the Master's Report.

Those taken in the Court below were as follows:

First Exception.

"For that the said Master has in and by his said report certified, on page six thereof, that 'the cap was the essential feature of the Graff burner. The respondent adopted Graff's arrangement and then reduced the price of the burner, forcing Graff to do the same in order to hold his trade. The evidence shows that the reduction in prices by Graff was solely due to the respondent's infringement. So far as the evidence shows, the only competitor with Graff in the use of his cap arrangement during the period covered by the accounting was the respondent.' Whereas, the said Master ought to have certified that respondent came innocently into possession of the burners by purchase in the ordinary course of business from legitimate manufacturers thereof in Germany, and that immediately upon being notified that they were claimed to be an infringement he ceased to sell the same. The evidence shows that at about the time Graff made the alleged reduction in the price of his burners there was thrown upon the market lamp-burners of other kinds of equal or greater power, which came directly in competition with the Graff burner, and that the reduction in price was the result of such competition; that the sale of 14 infringing burners by respondent, in the course of three years

trade, could not have been a sufficient competition to plaintiff's business to cause him to make a reduction of price: when the testimony shows that during the period from March 1st, 1886, when complainant reduced the price of burners, until Oct. 31st, 1878, he sold about 6,000 of said burners.

Second Exception.

For that the said Master hath certified, "That the amount of damages which the complainant has suffered and sustained from and by reason of said infringement, is two thousand, nine hundred and seventy-five dollars and fifty cents"; whereas, he should have reported nominal damages. In all which particulars, the report of the said Master is, as the said respondent is advised, erroneous, and the said respondent appeals therefrom to the judgment of this Honorable Court."

The first of these exceptions contains in reality two exceptions, and may be stated as follows:

1. The evidence shows that the defendants came into possession of the burners innocently, and were not wiiful or wanton infringers.

2. The evidence shows that there were other burners on sale in competition with appellees', and that therefore the reduction in prices was not caused solely by the infringing competition of appellants.

The second exception amounts to nothing, because it is not specific, and is too vague and general. We have already seen that such exceptions are not good, and must be disregarded. In *Dexter* vs. *Arnold* (2 Sumn. 125), the first exception was similar to the second exception here,

and the learned Judge said of it, "The first exception is utterly unmaintainable. It is too loose and general in its terms, and points to no particulars * * * * It amounts only to a general assignment of errors."

We herewith place the two exceptions side by side in parallel columns, so that the Court may readily compare them.

EXCEPTION IN *Dexter* vs. *Arnold.*	EXCEPTION IN *Graff* vs. *Boesch.*
"For that the said Master has stated and certified in said report that there is due on said mortgage $1,366; whereas he ought, as the plaintiffs are advised, to have reported that there is nothing due upon said mortage."	"For that the said Master hath certified that the amount of damages which the complainant has suffered and sustained from and by reason of said infringement is two thousand nine hundred and seventy dollars and fifty cents; whereas, he should have reported nominal damages."

Since appellants' so-called "Second Exception" is insufficient, and cannot be considered at all, they are left to rely on their so-called "First Exception." As we have already seen, that raises but two points, viz: That the infringement was not wilful, and that the reduction in prices was not caused solely by the infringement. Hence, all other possible objections to the Report must be disregarded, for those portions not excepted to are admitted to be correct. "The parts not excepted to must be tak-

en as admitted. "(Story *vs.* Livingston, 13 Pet. 359.)

The exceptions specified in the appellants' brief on this appeal are as follows:

Assignment of Errors.

"We therefore insist that the Court below erred in the following particulars.

1. In refusing to dismiss the case for want of jurisdiction.

2. The Court erred in deciding that the purchaser of an article from a manufacturer in a foreign country, who had been invested under the laws of said country with right to manufacture, use, and sell equal to that of a patentee of said article in said foreign country, would infringe upon an American patent applied for and issued to said foreign patentee after he had accepted a limited patent from said foreign Government.

3. In deciding that a narrow metal plate, which only extended from the circumferential center of the tubes outward and left the spaces between the tubes open to access of air to the flames, was an infringement on their first claim of letters patent sued on, wherein the cap is claimed specifically as preventing the access of air between the tubes.

4. In confirming the report of the Master.

5. In refusing to grant a rehearing on the showing made in and by respondent's petition for rehearing. And for the purpose of establishing error in the ruling of the Court in confirming the report of the Master, we insist that said Master erred in the following particulars:

1. The Master erred in permitting the complainant to waive profits and rely on damages only.

2. The Master erred in awarding damages after the defendants' profits had been fully proved.

3. The Master erred in basing damages on the reduction

of prices on the whole burner, where the invention is admitted to be simply the addition of a new feature, the cap, to an old machine (the mitrailleuse burner).

4. The Master erred in not taking into consideration the difference in damages between 14 burners and 114.

5. If damages were proper to be awarded at all, it was error to give damages covering a period of time longer than the time defendants were selling the infringing burners.

6. The Master erred in holding that the cap was the essential feature of complainant's lamp burners.

7. The Master erred in allowing damages on 10-wick burners, when the testimony shows that defendants never had any burners of that style on hand.

8. The Master erred in holding that the infringement was wanton and without excuse."

It will be seen that there is a vast difference between these two sets of exceptions, and hence we are called on to notice both sets. We shall first examine those specified in the brief, taking them up *seriatim:*

1. *That the Master erred in permitting the complainant to waive profits and rely on damages.*

In answer to this we say:

a. No such objection was taken to the report in the Court below, nor embodied in the written exceptions, nor argued, nor raised in any manner, shape or form in the Court below. It is purely an after-thought, raised for the first time in this Court. Hence it cannot be considered here at all.

b. But if the Court should consider it, notwithstanding the fact that it was not raised in the

lower Court, we can show that the point is not well taken.

Prior to 1870 there was no statutory provision authorizing a Court of Equity to assess damages in a patent case, but in that year such provision was inserted in the Statutes. (16 Stat. at Large, Ch. 230, § 55, p. 206.) The present patent law contains a similar provision, which is found in § 4921 of the revised Statutes. By that section a patentee is entitled to recover damages in an equity suit, *in addition to* the profits of the infringer; and the Court is authorized to assess such damages, or to cause the same to be assessed under its direction, and also to treble the same in its discretion, as in a Court of law.

Having ascertained on the accounting the amount of both damages and profits, if the profits are found to equal the damages, the Court will enter a decree for the profits and do nothing concerning the damages. (*Emigh* vs. *Railroad Co.*, 6 Fed. 283.) Where it appears on the accounting that the infringer has realized no profits, but that the complainant has sustained damages, then a decree will be entered for such damages, and nothing will be done as to profits. (*Marsh* vs. *Seymour*, 97 U. S. 348.) Where the accounting shows both damages and profits, and that the profits do not amount to so much as complainants' damages, the Court will allow him to waive all claim to profits and take a decree for the damages.

Birdsall vs. Coolidge, 93 U. S. 64.
Yale Lock Mf. Co. vs. Sargent, 117 U. S. 552.
Child vs. Iron Works, 19 Fed. R. 259.
Simpson vs. Davis, 22 Id. 444.
Star Salt Co. vs. Crossman, 4 Ban. & Ard. 566.

These cases are directly in point and decisive of the question. Here the profits realized by the infringers were practically nominal, and the damages of the patentee were large. A decree for the profits would not compensate him for the injury caused by the infringement, and hence he was allowed to waive profits and claim damages. This is a well settled principle of patent law.

It is claimed by appellants that by the decision of this Court in *Root* vs. *Railway Co.* (105 U. S. 189 a "complainant is not permitted in an equity case) to waive profits and demand damages only." No such rule of law is announced in that case. Nothing is said about a complainant's waiving profits and taking damages; but it is there decided that where the profits of an infringer are insufficient to compensate the patentee for the injury caused him, resort may be had to the damages suffered by him, and a decree therefor will be entered. The case at bar is precisely similar to *Yale Lock Manufacturing Co.* vs. *Sargent* (117 U. S. 552), where the complainant was allowed

to waive profits and take a decree for damages.

That case is decisive of the question.

2. *It is next urged that the Master erred in awarding damages after defendants' profits had been fully proved.*

This exception is a repetition, in different words, of the first exception, and the same answer is applicable thereto.

3. *The third exception is that the Master erred in basing damages on the reduction of prices on the whole burner, where the invention is admitted to be simply the addition of a new feature, the cap, to an old machine* (*the mitrailleuse burner*).

a. *In answer to this we have to say, the Master's Report was not excepted to in the lower Court on that ground.* There was no such exception, (see appellant's exceptions, *supra*), and hence the point cannot be raised in this Court for the first time.

b. *The point is not well taken on its merits.*

Of course we recognize the rule of law that in calculating an infringer's profits, where the patent covers only an improvement on an old machine, the profits recoverable are those due to the improvement alone, and not to the profits realized from the whole machine. In such case it is complainant's duty to segregate the profits, that is, to show what proportion is due to the patented parts, and what to the unpatented parts of the machine. But we have waived all claim to the

infringer's *profits*, and are seeking only the *actual damages* sustained by us from the infringement. Whatever those actual damages are, we can recover them, and all the authorities agree that one element of such damages is the loss accruing from the enforced reductions of the complainant's selling prices.

Yale Lock Mf. Co. vs. Sergeant, 117 U. S. 552.
Philip vs. Nock, 17 Wall. 460.
McComb vs. Brodie, 1 Woods, 153.
Bragg vs. Fitch, 16 Fed. R. 247.
Hobbie vs. Smith, 27 Id. 663.
Creamer vs. Bowers, 35 Id. 207.

The above cited case of *Yale Lock Mf. Co.* vs. *Sergeant* is decisive of the question under discussion.

Said his Honor, Mr. Justice Blatchford, in deciding that case:

"Reduction of prices and consequent loss of profits enforced by infringing competition is a proper ground for awarding damages. * * * The defendant also contends that the plaintiff is not entitled to recover from the defendant, as damages, the entire amount of the reduction enforced by the defendant's competition, but only the damages occasioned by the effect of the presence of the infringement; that the burden of proof is on the plaintiff to fix the value of, and to separate the effect of the intringing devices; that he failed to do so by any proper proofs; and that no basis was afforded to the Master on which such damages could be computed. But, as the Master allowed

damages only for the reduction of prices on the locks sold by the plaintiff, and as the essential feature of those locks was the turning-bolt device, and as the essential feature of the infringing locks was the infringing turning-bolt device in theirs, and as the plaintiff could not sell his turning-bolt device unless it was embodied in a lock, and as he was thereby enabled to make his profit on the entire lock, and as he was deprived by the acts of the defendant, in selling at low prices locks containing the patented turning-bolt device, of the profits he otherwise would have made on the locks which he actually sold containing the turning-bolt device, it seems plain that the defendant's infringement must be held to have caused the entire loss of the plaintiff by the reduction of prices, etc., etc."

In the above quotation, if we substitute the word *burner* for *lock*, and *cap* for *turning-bolt device*, it will read as though written expressly for a decision of the case at bar. The two cases are identical in principle. In ours the Master allowed damages *only for reduction in prices on burners sold by appellees.* The essential feature of those burners was the cap, covered by the infringed claim. The evidence so shows, and the Master so finds. Plaintiff could not sell the cap unless it was embodied in a burner, and thereby he was enabled to make his profit on the entire burner. Those entire profits were due to the patented feature, the cap. By the acts of appellants in selling at low prices burners containing the patented cap, he was compelled to reduce his prices, and was thereby deprived of the profits he otherwise would have made on the burners which he

actually sold containing the cap. Hence, the infringement must be held to have caused the entire loss of plaintiff by the reduction in selling prices. The evidence of two witnesses is direct, positive and uncontradicted, that the reduction in prices was caused solely by appellants' infringement.

The case is also similar to that of *Fitch* vs. *Bragg*, 16 Fed. R. 247, where the patent covered a *tongue* in a *snap-hook*, an improvement on an old device. Said Judge Shipman, in deciding the case:

"While it is not true that the tongue is the whole of the device, or that the hook is not an indispensable part of it, yet the tongue is the peculiar and variable, and as has been said, the essential feature in all snap-hooks of this class, and the hook is the unvarying feature to which the tongue is attached. Both together constitute a snap hook, and the patented tongue must, in connection with an unpatented hook, be placed in the form of a snap-hook for sale. This state of facts brings the case within the principle which is stated in *Sargent* vs. *Yale Lock Manufacturing Co.*, 17 Blatch. 244, and which is, that when reductions of prices in the plaintiff's sales is the only element of damages, if the essential feature of plaintiff's structure and of the infringing structure, respectively, is the patented device, and the patented device being only a part of the structure must necessarily be embodied in the completed structure for sale, and he is enabled by the presence of such patented device to make his profit on the entire structure, and he is deprived by the acts of the defendant, in selling at low prices infringing structures containing the patented device, of the profit which he otherwise would have made on the structures containing the patented device which he actually sold, it seems plain that the defendant's infringement must be held to have caused

the entire loss of the plaintiff by the reduction of prices, after allowing a proper sum for any other patented device contained in the defendant's structures, and for any other cause which gave to the defendant an advantage in selling his structures."

The same views were announced by this Court in *Manufacturing Co.* vs. *Cowing*, 105 U. S. 253, where the patent covered only an improvement on an old device, and yet losses on the entire device were held to be the proper measure of damages, on the ground that the patented feature gave to the device its peculiar value.

Here the cap gives to the burner its peculiar value. Appellee Graff testifies that it would not burn without the cap (Record, 44,) and all the witnesses agree that it makes the burner what it is, viz.: *the very best coal oil burner in existence.*

And while we are on this point, it will not be out of place to recur to the evidence on which the Master based his finding concerning the reduction of prices.

Appellee Albert Graff testified on this point as follows:

"I established the price of the burners when I commenced selling them; kept up that price until the spring of 1886; on March 1, 1886, I reduced the price, on account of the infringment of this burner by Mr. Boesch; he had been infringing prior to that; purchasers came into my store every day, and told me they could get the burners cheaper around the corner from Mr. Boesch, and they went there and bought them; his store was right around the corner; these people would first ask me the prices of my burners; sometimes they would buy from me, and they would go around the corner, and come back or

send back and countermand their orders; they would say they could get them cheaper from Mr. Boesch; it was through this that I reduced my prices; that thing occurred frequently and then I reduced my prices.

Test. of Graff, Record, 40–2.

On cross-examination he testified as follows:

"After I reduced my prices I did not sell more burners than I did before, because Mr. Boesch could still sell them cheaper than mine. The cost of the lamps has been the same all the time."

Test. of Graff, Record, 44–5.

Antoinette Graff testified:

That she was the wife of Albert Graff, and kept the books and tended the store; that the prices were reduced because they were compelled to do so. Their customers would say — How is it that you sell burners so much higher than Mr Boesch does? We would say we couldn't sell them any cheaper, and they said they couldn't buy them from us. The customers came personally into the store, and said this more than once. I couldn't tell how many, but I heard it every day, and that was the reason we reduced our prices.

Record, 45–7.

This evidence shows conclusively that the reduction in prices was caused solely by the infringement of appellants. *That evidence was not denied* It was not questioned in any manner, shape or form by appellants, and there is not a syllable of evidence offered by them to contradict it.

It further appears that appellees never granted any licenses, and never fixed any royalty for the

use of the invention (Record, 40). Graff then kept his patent as a close monopoly, granted no licenses, and derived his remuneration from selling the patented article himself, and he was at all times able to supply the demand.

This case falls directly within both the law and the facts of *Yale Lock Manuf. Co. vs. Sargent*, 117 U. S. 536. There the patent contained five claims, the essential feature of which was a "turning-bolt" used in a lock for safes. Only one claim had been infringed. Defendants had sold a lock containing the turning-bolt, and the complainants were thereby compelled to reduce the price of their lock. It was held that they could recover the loss suffered by this enforced reduction. Said Mr. Justice Blatchford, in deciding the case:

"This is a case where patentee granted no licenses, and had no established license fee, but supplied the demand for his lock himself, and was able to supply that demand. The market for the lock was limited to safe-makers. No one but a safe-maker wanted or would buy such a lock. The Master was unable to determine from the proof what profits, if any, the defendant had made from the use of the turning-bolt. He disallowed all items of damage from the loss to the plaintiff of the sale of infringing locks sold by the defendant, and confined his award to the enforced reduction of price on the locks which the plaintiff sold, caused by the infringement. That this is a proper item of damages, if proved, is clear. It is a pecuniary injury caused by the infringement, and is the subject of an award of damages, although the defendant may have made no profits and the

plaintiff may have had no established license fee. As the plaintiff, at the time of the infringement, availed himself of his exclusive right by keeping his patent a monopoly and granting no licenses, the difference between his pecuniary condition after the infringement and what his condition would have been if the infringement had not occurred, is to be measured, so far as his own sales of locks are concerned, by the difference between the money he would have realized from such sales if the infringement had not interfered with such monopoly, and the money he did realize from such sales. If such difference can be ascertained by proper and satisfactory evidence, it is a proper measure of damages.

The damages to be recovered (Rev. St., §§ 4919, 4921) are "actual damages," and they may properly include such losses to the plaintiff as were allowed in this case. *McComb* vs. *Brodie*, 1 Woods, 153, 161; *Philp* vs. *Nock*, 17 Wall. 460, 462.

The turning-bolt was the essential feature of the Sargent lock. The defendant adopted Sargent's arrangement, and then reduced the price of the lock, forcing Sargent to do the same in order to hold his trade.

The evidence shows that the reduction of prices by Sargent was solely due to the defendant's infringement."

This case is decisive of the case at bar. The essential feature of our invention is the cap. The defendant adopted that feature and then reduced the selling price, forcing us to do the same in order to hold our trade. Change the name Sargent to that of Boesch, and the decision would read as though written expressly for this case. Indeed, our case is in one respect stronger than the Sargent case, for there was not even an attempt made to show that Graff's reduction in prices was due to any other cause than Boesch's

nfringement, whereas in the Sargent case it was shown that there were several other infringers besides the defendant, and it was urged that such infringements must have contributed to the reduction in prices.

There is no such element in our case. The reduction in price was due solely to the infringement, and there is no denial of the testimony in that regard.

4. *The next exception is that the Master erred in not taking into consideration the difference in damages between* 14 *burners and* 114.

This exception was not made below. It is not embodied in the written exceptions. It is made for the first time in this Court, and for that reason cannot be considered.

We will remark, however, that it is immaterial. If an infringement does actually cause a reduction in prices, it matters not how limited the infringement is. The reduction here was caused *solely by the appellants' infringement.* The evidence on this point is not denied. Hence it matters not whether the appellants sold only 14 or 114, or any particular number. Their infringement caused the reduction, and that was the only point to be determined.

5. *It is next insisted that if damages were proper to be awarded at all, it was error to give damages covering a period of time longer than the time defendents were selling the infringing burners.*

Here, again, we have to repeat our oft-urged point that no such exception was taken to the Master's report in the lower Court, and that it is raised for the first time in this Court on this appeal. Such practice will not be allowed.

But to show that the so-called exception is not well taken in point of fact, we merely remark that the appellants did not cease their sales *until the entry of the interlocutory decree* in this case. Says counsel, at page 23 of his brief: "The testimony shows that the defendants did not sell any of the infringing burners after the commencement of the suit—a period of a year and a half. Defendants ceased selling when they were sued."

This statement we deny point blank. It is not in accord with the facts.

6. *The sixth assignment of error in the brief* (p. 28) *is, that the Master erred in holding that the cap was the essential feature of complainants' lamp-burner.*

That the said finding is correct, is clearly shown by the evidence.

Test. of Graff, qs. 77-80, Record, 44.
Test. of Graff, qs. 16–22, Record, 72.
Test. of Stott, Record, pp. 63-66.
Test. of Tower, Record, pp. 70–1.

See also on this point the decision of the German Court in the cases against Hecht (Record, 126), and Eckel (Record, 120), and also the specification of the patent itself.

From the foregoing evidence, the Master was fully justified in finding that the cap was the essential feature of the burner. Besides, if it was not, why did appellants use it? And when they changed their burners, why did they chip off only a portion of the cap (leaving the other part remaining), and did not remove it entirely? It would have been much easier to remove the cap entirely than to cut away a part of it.

7. *The seventh exception is that the Master erred in allowing damages on* 10 *wick burners and* 12*-wick burners, when the testimony shows that defendants never had any burners of that style on hand.*

This exception was not made in the Court below, but appears in this Court for the first time Hence it cannot be considered.

At best, even if it can be considered at all, it is but a trivial matter, and cannot affect the decree. By reason of appellants' sales of 16 and 20-wick burners, appellees were compelled to reduce prices. They were selling at the time 16, 20, 12 and 10-wick burners. The most ordinary business experience will show that if they were compelled, by infringing competition, to raise prices on 16 and 20-wick burners, they would also have to reduce prices on the 10 and 12-wick burners. It would be business folly to reduce prices on one style and keep up prices on the other. Hence

it may be safely said that appellees were compelled to reduce prices on all styles of their burners by reason of the infringing competition.

8. *The last point urged is that the Master erred in holding that the infringment was wanton and without excuse.*

Throughout his brief, counsel again and again asserts that appellants acted in good faith, and were not wanton infringers. He asserts that they ceased infringing as soon as they were notified; that they sold no infringing burners after this suit was brought; that "they ceased infringing the instant they were informed that the burner was claimed to infringe upon the patent."

Unfortunately for counsel, these statements in his brief are not supported by the evidence, but on the contrary, the very opposite is true. The appellants never did cease infringing until the decree was rendered against them, and the record shows that their acts were a wilful, wanton, and persistent interference with the rights of appellees.

In January, 1886, appellants imported the first lot of infringing burners. The bill of complaint was filed September 17, 1886 (Record, 6). After selling a portion of these burners, they were notified of the infringment; but instead of ceasing to infringe, they merely chipped off a portion of the rim of each cap, thereby converting the burners into what is termed the "half-capped" burners, and persistently continued their sales.

Not content with that, after the suit was commenced, to wit, about January, 1887, they imported a second lot, comprising 200 full-capped burners, and continued their sales in that form. After the interlocutory decree was entered, they changed the remainder of this lot by removing the caps. Hence, we see that the appellants persistently continued their infringement until they were enjoined by the interlocutory decree.

The Hatton & McFadden episode mentioned in appellants' brief is of no value in showing appellants' good intentions. That firm, it appears, offered to sell Boesch one dozen full-capped burners (evidently being a mere sample lot), and Boesch says he refused to take them. It is incredible to believe that Boesch is disingenuous in saying he refused to take the burners because they were an infringement, when he was at that very time selling infringing burners imported from Berlin; and he afterwards ordered 200 more. The record, taken as a whole, shows that Boesch was a wilful and wanton infringer. He sells the full-capped burners as long as he can, then seeks to evade the patent by the subterfuge of chipping off a portion of the cap, when it was much easier to have removed the cap entirely. Further, he deliberately reduces the selling prices of the burners, and thereby causes appellees to do the same. It was the attempt of a large dealer to crush and

destroy a small rival. We say the Master was fully justified in his finding.

But further: this matter is one of fact decided by the Master, depending upon the weighing of conflicting testimony, the appearance and conduct of witnesses, their manner of testifying, and their general bearing and demeanor, all of which could be determined only by personal investigation. The Master saw them personally, heard their oral testimony, and from all the facts and circumstances drew his conclusion. He alone was competent to judge of the matter, and we apprehend that this Court will not undertake to say that he was wrong. As was said by Mr. Justice Gray, in *Tilghman* vs. *Procter*, (125 U. S. 139,) and by Mr. Justice Blatchford, in *Callaghan* vs. *Meyers*, (128 U. S. 617,): "The conclusions of the Master, depending upon the weighing of conflicting testimony, have every reasonable presumption in their favor, and are not to be set aside or modified, unless there clearly appears to have been error or mistake on his part."

It is submitted that the decree ought to be affirmed.

JOHN H. MILLER,
Attorney for Appellees.

Appendix A.

GRAFF ET AL., *vs.* BOESCH ET AL.

(Circuit Court, N. D. California. Oct. 3, 1887.)

1. *Patents for Inventions—Patentability—Infringement.*

On the facts disclosed by the proofs, *held*, that the first claim of letters patent No. 289,571, granted to Carl Schwintzer and William Graff for a lamp burner, shows a patentable invention, and is infringed by the lamp burners sold by Respondent.

2. Same—*Rights of purchasers in the United States from manufacturer in a foreign Country.*

Where an invention was patented in Germany, and subsequently patented in the United States, and under the German patent laws a manufacturer in Germany had a right to practice the invention in Germany because he had made preparation to do so prior to the issue of the German patent, and for that reason the German patent was of no effect against him, a purchaser in the United States, purchasing from such manufacturer in Germany, has no right to sell the articles in the course of trade in the United States, without license from the owner of the United States patent.

(Syllabus by the Court.)

In Equity—Bill for Infringement of Patent.

LANGHORNE & MILLER, for Complainants.

SCRIVNER & BOONE, for Respondents.

SAWYER, J. (orally). I have carefully examined this case. I am not satisfied that the first claim does not cover a patentable invention. It is a combination. The German Court, which had it under consideration, evidently held it to be a patentable invention. It was also of the opinion that the defendant's instrument is an infringement, and so am I. At all events, I am not satisfied that it is not a patentable invention. The patent itself is prima facie evidence on this point, which is not satisfactorily overthrown. It is claimed, however, because a man by the name of Hecht has a right to manufacture this invention

in Germany, that these articles which the defendant brought here, having been purchased in Germany of him, who had a right to manufacture them, the purchaser can lawfully import and sell them here. I do not think that can be done. I do not think the case is at all within the range of any of the cases cited.

In fact, the first case cited by the defendant is directly the other way. The case that has gone further than any of them is *Adams* vs. *Burke*, 17 Wall. 453, decided by the Supreme Court, where the patentee holding an American patent had himself sold his right to a particular district, free from any restrictions whatever. It was held that a purchaser from an assignee within the district to which the right was sold, of an article manufactured in the district, was authorized to use the article in any district. But the decision was carefully limited to the use. Nothing was said as to the right to sell the article outside the district.

The case of *McKay* vs. *Wooster*, 2 Sawy. 373, cited from the decisions of this Court, does not go so far as seems to be generally supposed, because that is limited, so far as the facts and the decision go, to the case where a patentee had sold a limited territory while owning the whole, without any limitation or restriction whatever, so that the assignee could make and sell within that territory without limitation or restriction, to be used anywhere, as the patentee could do. A subsequent assignee of another district could not obtain any more than the patentee had at the time of the latter assignment. The patentee could have sold the right to use anywhere in the United States at the time of the first partial assignment. He did not put in the assignment any limitation or restriction as to the sales within the district assigned.

The next purchaser who takes another portion of territory, takes subject to that right before assigned, which counsel did not seem to have noticed. The purchase of California in that case was a subsequent purchase of territory with this limitation

upon it. The patent for the invention involved in this case is not an American patent at all. It is a German patent.

Hecht, the man who has a right to manufacture in Germany, did not get his right from the patentee. He does not claim under the patent. Under the laws of Germany, when a patent is issued, if another man has made a machine of the kind patented, or is prepared to make it before the patent issues, the patentee has no right as against him. That was the position of Hecht, who manufactured in Germany the infringed articles now in question, and sold them to the party who imported them from Germany and sold them here. At the time that patent was issued or applied for, Hecht had already made the patented article, or got machinery ready for making it. That under the German law took it out of the patent as to him, so that although the patentee had a right in Germany as against anybody else, he had no right as against Hecht. Hecht did not get his right from the patentee at all. He got it wholly independent of him, so that even if the same invention is patented in this country, he got no right from the patentee in either country.

Hecht simply got such right as the German patent law gave him. If these parties here can buy of any body else who can lawfully manufacture the machine in Germany without the consent of the patentee, then all that is necessary to do to defeat or avoid an American patent is to step over the line to Mexico or Canada, where the patent does not reach, and manufacture and stock the market in the United States by importation, which can be done without any authority from the patentee. This is an American patent. The complainants claim under it. They have purchased it, and no one else has got any right from the patentee in this country. I hold that parties who sell in the United States the patented articles manufactured in other countries, where the invention is not protected by a patent, are infringers. I therefore find in favor of the complainants on the first claim of the patent. It will be referred to the Master, to ascertain the profits and damages.

Appendix B.

Master's Report.

Mr. Boesch, one of the respondents, was the only witness introduced on behalf of respondents. From his testimony it appears, that about the first of January, 1886, he purchased and put upon the market an invoice of lamp-burners, comprising fifty with caps, like complainants' Exhibit "C," and one hundred with half caps, of the style represented by complainants' Exhibit 12-wick burner; that, after having sold but four of the capped burners, he was notified that he was infringing complainants' patent, and he thereupon altered the remainder of the fifty capped burners, and converted them into the half-capped style; that about a year later he obtained a second invoice, consisting entirely of capped burners, two hundred in number; that of these he sold ten without alteration, changing all of the remainder which he sold, either converting them into half-capped burners, or removing the cap altogether.

Although, according to this testimony of respondents, but four of the capped burners of the first lot were sold, and all of the remainder sold must therefore either have been the half-capped burners imported, or half-capped burners made by removing a portion of the cap, yet respondents' entire sales seem to have been sufficient to justify them in sending for a second invoice.

It seems unaccountable that, in procuring a fresh supply, only capped burners should have been ordered, if so few capped burners had been sold, and if no further violation of complainant's rights under his patent had been contemplated. It is difficult to understand why the respondents should purchase burners requiring the labor and expense of alteration to make them of a kind which they believed themselves entitled to sell, when they could just as readily, and at no greater cost, have procured burners of that identical kind, as they had heretofore done. Besides, it is admitted that ten of the burners of the second invoice were sold without alteration.

The chief feature of the patented invention was the cap, and the half capped burner is probably as much of an infringement as the respondents' capped burner. Mr. Boesch insists most vigorously that the cap is a nuisance, and that burners from which the caps have been entirely removed are superior to those of complainant; and he states that burners of that class were in general public use long before the date of the patent in suit. If these assertions are true, the infringement was wanton and without excuse. It is apparent that the removal of the entire cap would have required less care, and would have been attended with less labor, than the removal of a portion of the cap, and would have given respondents a burner which they had an unquestionable right to sell. The evidence shows that the infringement was a wilful and persistent violation of the rights secured to complainant by his patent.

That material injury resulted to complainant's lamp burner trade from the infringement of respondents, there can be no doubt. It is an admitted fact that complainant was at all times in a position to supply the demands of the trade for burners of this class; and the testimony clearly shows that in many cases the loss of sales by complainant was directly attributable to the infringement. By the testimony of complainant and his wife, who is his clerk and book-keeper, it is shown that complainant introduced his patented burners to the trade in the fall of 1883, and that the goods found a ready market, his sales prior to the time of the commencement of the sale of the infringing burners amounting to six or seven thousand, and his entire sales up to the latter part of the year 1887 aggregating some ten or twelve thousand; that he granted no licenses; that upon introducing the patented article he fixed upon a schedule of prices, which prices were maintained until some time in the spring of 1886, when, because of the introduction and sales of respondents' lower priced infringing burners, complainant's trade fell off, and he was compelled to reduce, and did reduce, both his wholesale and his retail prices.

It is a fact of common knowledge that there is to be found on sale in the market a great variety of lamp-burners, among which, as shown by the evidence, have been for many years burners of the same general class as complainant's. In view of this fact, the large number of sales made by complainant at high prices, to a limited trade, affords sufficient proof that the efficiency and marketability of his burners were due to his patented improvement.

This, then, is a case where the owner of the patent granted no licenses, and had no established license fee, but supplied the demand for the burner himself, and was able to supply that demand. He waives claim to the infringer's profits, and confines his claim to the enforced reduction of price on the burners which he (complainant) sold, caused by the infringement.

"That this is a proper item of damages, if proved, is clear. It is a pecuniary injury caused by the infringement, and is the subject of an award of damages, although the defendant may have made no profits, and the plaintiff may have had no established license fee. As the plaintiff at the time of the infringement availed himself of his exclusive right by keeping his patent a monopoly and granting no licenses, the difference between his pecuniary condition after the infringement, and what his condition would have been if the infringement had not occurred, is to be measured, so far as his own sales are concerned, by the difference between the money he would have realized from such sales if the infringement had not interfered with such monopoly, and the money he did realize from such sales. If such difference can be ascertained by proper and satisfactory evidence, it is a proper measure of damages. The damages to be recovered (Rev. Stats., sections 4919 and 4921) are 'actual damages'; and they may properly include such losses to the plaintiff as were allowed in this case," to wit, the losses incurred by reason of such enforced reduction in the patentee's prices.

Yale Lock Mfg. Co., vs *Sargent*, 117 U. S. 552.

The cap was the essential feature of the Graff burner. The respondent adopted Graff's arrangement, and then reduced the

price of the burner, forcing Graff to do the same, in order to hold his trade. The evidence shows that the reduction in prices by Graff was solely due to the respondent's infringement. So far as the evidence shows, the only competitor with Graff in the use of his cap arrangement during the period covered by the accounting was the respondent.

After the reduction in his prices, complainant sold, at wholesale, one thousand three hundred and twelve ten-wick burners, at a price twenty-five cents less on each than his original price; four hundred and fifty twelve-wick burners, at fifty cents less; five hundred and ninety-two sixteen-wick burners, at seventy-five cents less; and seven hundred and sixteen twenty-wick burners at seventy-five cents less; a total difference between the original and the reduced prices of one thousand five hundred and thirty-five dollars and fifty cents.

In addition, he sold at retail, on an average, five burners on each of the five hundred and seventy-four business days between the time when his prices were first reduced and October 31st, 1887; the number of burners thus sold being two thousand eight hundred and seventy, which were sold at a minimum reduction of fifty cents each under original prices—a total difference between the original and the new prices of fourteen hundred and thirty-five dollars; which sum, added to the said sum of one thousand five hundred and thirty-five dollars and fifty cents, gives an aggregate amount of two thousand nine hundred and seventy dollars and fifty cents.

I therefore find, and do report, that the number of lamp burners proven to have been sold by respondents, containing the invention claimed in and by the first claim of co nplainant's letters patent, is fourteen, provided that only the capped burners sold contain said invention, and that the number is one hundred and fourteen, if the half-capped buurners so sold are to be held to contain said invention; that complainant waives claim to any and all of the gains, profits and advantages which said respondents have received, or which have arisen or ac-

crued to them, from and by infringing upon said first claim of said letters patent; and that the amount of damages which the complainant has suffered and sustained from and by reason of said infringement, is two thousand nine hundred and seventy dollars and fifty cents.

Respectfully submitted,

(Signed) S. C. HOUGHTON,

Filed, April 30, 1888. Master, &c.